

No. 13096

United States
Court of Appeals
for the Ninth Circuit.

EUGENE S. SMITH & CO., INC., a Corporation,
Appellant,
vs.

ELOY GIN CORPORATION, a Corporation, and
HOME INSURANCE COMPANY, a Corporation,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona.

FILED

NOV 30 1951

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INDEX

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PAGE

Appeal:

Bond for Costs on..... 58

Clerk's Certificate to Record on..... 195

Designation of Contents of Record on
(U.S.D.C.) 60

Notice of, Plaintiff's..... 58

Statement of Points on Which Plaintiff
Intends to Rely Upon (U.S.D.C.)..... 61

Appellant's Statement of Points and Designa-
tion of Record to Be Printed (U.S.C.A.).... 199

Designation of Record to Be Printed..... 199

Statement of Points..... 199

Stipulation Re Exhibit No. 1-C..... 202

Attorneys of Record..... 1

Bond for Costs on Appeal..... 58

Clerk's Certificate to Record on Appeal..... 195

Designation of Contents of Record on Appeal
(U.S.D.C.) 60

INDEX

PAGE

Exhibits, Plaintiff's:

No. 1—Stipulation of Facts.....	69
1-A—Contract No. P-200 Dated November 7, 1945.....	74
1-C—Gin Yard Receipt.....	77
1-D—Fire Insurance Policy No. 6857..	79
1-E—National Fire Insurance Co. Marine Fire Insurance Policy No. OC—58587.....	104
1-F—Loan Draft Issued by National Fire Insurance Company.....	120
1-G—Loan Agreement Executed by Eugene B. Smith & Co.....	122
2—Deposition of T. S. McCorkle.....	167

Findings of Fact and Conclusions of Law.....	49
--	----

Conclusions of Law.....	53
-------------------------	----

Findings of Fact.....	49
-----------------------	----

Judgment	54
----------------	----

Minute Entries:

October 23, 1950.....	22
-----------------------	----

October 27, 1950.....	40
-----------------------	----

March 30, 1951.....	48
---------------------	----

June 11, 1951—Denying Motion for New Trial	57
--	----

Motion to Dismiss, Amended Answer and Cross-Claim of Eloy Gin Corp.....	23
---	----

INDEX	PAGE
Motion to Dismiss, Memorandum in Support Thereof, and Separate Answer of the Home Insurance Company.....	3
Motion to Dismiss and Plea in Bar, and Answer of Cross-Defendant to Cross-Claim.....	28
Motion to Dismiss and Plea in Bar and Answer to Plaintiff's Second Cause of Action in Its Second Amended Complaint.....	43
Motion for New Trial.....	56
Notice of Appeal, Plaintiff's.....	58
Order Extending Time.....	59
Reporter's Transcript.....	64
Witnesses, Plaintiff's:	
Bolt, George K. —direct	139
Churchill, Charles Noble, Jr. —direct	125
McKesson, Theodore G. —direct	144
Second Amended Complaint for Damages by Reason of Fire Loss.....	34
Separate Answer of Eloy Gin Corporation....	15
Statement of Points on Which Plaintiff In- tends to Rely Upon Its Appeal (U.S.D.C.)..	61
Stipulation of Fact (Plaintiff's Exhibit No. 1)	69

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In the United States District Court
for the District of Arizona

No. Civil 1135

EUGENE B. SMITH & CO., INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME
INSURANCE COMPANY,

Defendants.

MOTION TO DISMISS AND SEPARATE
ANSWER OF THE HOME INSURANCE
COMPANY

Comes Now the Home Insurance Company, by its attorneys, Theodore G. McKesson and Robert H. Renaud, and in appearance to the plaintiff's amended complaint, moves the Court for an order dismissing plaintiff's amended complaint for damages by reason of fire loss, on the grounds and for the reasons that said amended complaint is based upon a claim upon a contract of fire insurance against The Home Insurance Company and is barred by the statutes of limitations. That the plaintiff's amended complaint fails to state a claim against this defendant upon which relief may be granted.

Wherefore, the defendant prays that said amended complaint be dismissed, that it recover

judgment against the plaintiff, together with its costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Defendant,
The Home Insurance
Company.

Separate Answer of The Home
Insurance Company

In the event the foregoing Motion to Dismiss is denied, but without waiving same, in further appearance to plaintiff's amended complaint, this defendant admits, denies and alleges:

Not being advised of the corporate status of or of the assignment of said claim by Eugene B. Smith, an individual, to Eugene B. Smith & Co., denies same upon information and belief and requires strict proof thereof. Defendant admits that Eloy Gin Corporation is an Arizona corporation, and admits that this defendant is a New York corporation. Admits that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

I.

This defendant is not advised as to whether or not Eugene B. Smith, dba Eugene B. Smith & Co. was the owner of 40 bales of cotton evidenced by warehouse receipts on and prior to the 25th day of

January, 1946, and therefore denies same upon information and belief and requires strict proof thereof. Admits all other allegations of paragraph I.

II.

In answer to paragraph II of said amended complaint, this defendant admits that it had, prior to January 25, 1946, a policy of fire insurance, No. 6857, insuring Eloy Gin Corporation against loss by fire, but denies that said policy of fire insurance was for the benefit of Eugene B. Smith, dba Eugene B. Smith & Co., or others having cotton in the possession of the defendant Eloy Gin Corporation holding receipt therefor, and alleges that said policy, among other things, provides:

“This policy insures Eloy Gin Corporation.

Loss, if any, to be adjusted with the Insured named herein and payable to Insured . . .”

This defendant denies that it has any liability whatsoever to Eugene B. Smith, dba Eugene B. Smith & Co.

III.

In answer to paragraph III of said amended complaint, this defendant admits that on or about January 25, 1946, a fire occurred in the premises of Eloy Gin Corporation and destroyed 39 bales of the said 40 bales of cotton. Denies that said bales of cotton had an actual cash value at the date of said loss of \$4,736.85, and in that regard alleges that the reasonable cash market value of said cotton at said time was \$4,028.61.

IV.

In answer to paragraph IV of said amended complaint, this defendant admits that at the time of said loss and damage by fire to said 39 bales of cotton, that same were in the physical possession of Eloy Gin Corporation under warehouse receipts. Denies that said 39 bales of cotton were protected by insurance of this defendant, and in that regard alleges that only Eloy Gin Corporation was protected by insurance for fire, and that they had made a separate contract with the assignee of plaintiff, whereby Eugene B. Smith, dba Eugene B. Smith & Co. had assumed all damage and loss by fire of said 39 bales of cotton, when it paid the drafts for said cotton with the gin receipts attached.

V.

In answer to paragraph V of said amended complaint, this defendant denies that as a result of said fire and damage to the 39 bales of cotton Eloy Gin Corporation became liable to Eugene B. Smith, dba Eugene B. Smith & Co. for the destruction of said cotton by fire. Denies that the Home Insurance Company by virtue of its policy of fire insurance issued to the defendant Eloy Gin Corporation became liable for damage to the 39 bales of cotton, and denies that the defendant's policy of insurance inured to the benefit of Eugene B. Smith, dba Eugene B. Smith & Co.

VI.

In answer to paragraph VI, this defendant denies that Eugene B. Smith, dba Eugene B. Smith

& Co. duly made a claim against Eloy Gin Corporation for the amount of said loss and damage, and in that regard alleges that the National Fire Insurance Company through the Cotton Insurance Association made a demand upon Eloy Gin Corporation for such loss by fire, as it had paid Eugene B. Smith, dba Eugene B. Smith & Co. for the loss of said cotton under its policy of marine insurance, as the said Eugene B. Smith was the owner of said cotton at the time of said fire, and the risk by fire of said 39 bales of cotton was assumed by the said Eugene B. Smith, dba Eugene B. Smith & Co. upon his paying the drafts for said cotton, evidenced by gin receipts, which had been done prior to January 25, 1946. This defendant denies that Eloy Gin Corporation filed a proof of loss with this defendant for said loss. Admits that this defendant has refused to pay Eugene B. Smith & Co. and/or its insurance carrier, National Fire Insurance Company, through the Cotton Insurance Association.

VII.

Not being advised of the truth or falsity of the allegations of paragraph VII, this defendant denies same upon information and belief and requires strict proof thereof.

VIII.

Further answering plaintiff's amended complaint, this defendant alleges that same fails to state a claim against this defendant upon which relief may be granted, and alleges that more than one year

has expired since said loss, and that if the plaintiff had a cause of action against this defendant its right to bring such an action expired within twelve months after January 25, 1946, and that this action was not brought for almost two years after January 25, 1946.

IX.

Further answering said amended complaint and in complete bar thereof, this defendant alleges that in November, 1945, the plaintiff's assignee executed two purchase orders for a 1,000 bale lot and a 300 bale lot of cotton from Eloy Gin Corporation, which was confirmed in writing, which provided, among other things, the grade, staple, price, weights and delivery of not less than 100 bale lots as fast as ginned and grades obtained. That said agreements among other things provided as follows: that the insurance on the cotton so purchased in the said contracts should be at "sellers' risk until payment completed"; that said contracts further provided that the seller, Eloy Gin Corporation, was to be paid on sight draft with gin yard receipts attached, together with grade receipts, through the Valley National Bank at Phoenix, Arizona.

That said written sale and purchase contracts were fully carried out prior to January 25, 1946, the date of the fire alleged in plaintiff's amended complaint; that the 39 bales of cotton alleged to have been destroyed in plaintiff's amended complaint, upon which it alleges it held gin receipts, were paid for more than a month before the date of said fire by draft drawn by Eloy Gin Corpora-

tion upon the plaintiff's assignee through The Valley National Bank, and that in accordance with said contracts the payment of all of said 1300 bales of cotton had been completed on or before the date of said fire, and that therefore all risk on said cotton was thereafter upon the buyer, assignee of plaintiff herein by special contract; that, therefore, Eloy Gin Corporation by special contract relieved itself of any liability to Eugene B. Smith, dba Eugene B. Smith & Co., and any loss sustained by said fire was by special agreement assumed by the plaintiff's assignee.

X.

Further answering said amended complaint, this defendant alleges that prior to January 25, 1946, Eugene B. Smith, dba Eugene B. Smith & Co., plaintiff's assignor, had insured all of its cotton that it had title to and had paid for, together with the cotton alleged to have been destroyed by fire in defendant Eloy Gin Corporation's gin yard, with the National Fire Insurance Company through the Cotton Insurance Association, a marine insurance carrier, which insured the plaintiff's assignee for loss by fire or other destruction on all cotton to which it had title, and this defendant is informed and believes and therefore alleges that the said Eugene B. Smith, dba Eugene B. Smith & Co., assignor of the plaintiff herein, was paid for the loss of said cotton by the National Fire Insurance Company through the Cotton Insurance Association for the 39 bales of cotton destroyed on or about January 25, 1946, in the gin yard of Eloy Gin

Corporation. That by virtue of the contract by the plaintiff and the defendant Eloy Gin Corporation, the plaintiff assumed all risk of insurance and loss of said cotton after the plaintiff had paid for said cotton in accordance therewith, and the defendant Eloy Gin Corporation became and was relieved of any responsibility for the loss of said cotton; and this defendant further alleges that the plaintiff is not the real party in interest in this action, and that neither it nor the insurance carrier, National Fire Insurance Company through the Cotton Insurance Association, are entitled to recover from the Home Insurance Company or from Eloy Gin Corporation.

XI.

Further answering said amended complaint, this defendant alleges that this defendant at the time of said fire on or about January 25, 1946, under its policy of insurance No. 6857 only insured Eloy Gin Corporation and not the plaintiff or its assignor or any other person or persons that had cotton stored in the said gin yard, evidenced or not evidenced by warehouse receipts, and in that regard this defendant alleges that its said policy provided as follows:

“This policy insures Eloy Gin Corporation. Loss, if any, to be adjusted with the Insured named herein and payable to Insured . . .”

XII.

Further answering said amended complaint, this defendant alleges that Eloy Gin Corporation made no claim under its proof of loss for the 39 bales

of cotton mentioned and no sums were paid Eloy Gin Corporation for said 39 bales of cotton. That more than sixty days have elapsed since the proof of loss filed with this defendant was made and paid, which did not include the 39 bales of cotton herein mentioned. That Eloy Gin Corporation did not bring an action against this defendant for any loss under the 39 bales of cotton mentioned within twelve months from the date of said loss, as provided in the New York Standard Form of insurance contract which was adopted as part of the laws of the State of Arizona, which said policy, among other things, provides:

“No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.”

That by reason of the facts herein alleged, this defendant is not liable under its said policy of insurance to the plaintiff or its assignor or to the Eloy Gin Corporation.

XIII.

Further answering said amended complaint, this defendant alleges that Eugene B. Smith, dba Eugene B. Smith & Co., had specific insurance with National Fire Insurance Company through the Cotton Insurance Association, and that the policy of this defendant, among other things, provides as follows:

“7. ‘Excess Clause.’ This policy does not

attach to or become insurance against any peril upon property herein described which at the time of any loss is insured by specific insurance as defined in paragraph 6, until the liability of such specific insurance has been exhausted, and then shall cover only such loss or damage as may exceed the amount due from such specific insurance (including the amount otherwise due from invalid insurance had same been valid, and including also the amount due from any uncollectible insurance) after application of any contribution, coinsurance, average, distribution, or other similar clauses contained in policies of such specific insurance affecting the amount due thereunder, not, however, exceeding limits as set forth herein."

XIV.

That if it be found that this defendant's insurance policy inures to the direct benefit of Eugene B. Smith, dba Eugene B. Smith & Co. as of January 25, 1946, and if it be found that Eloy Gin Corporation is responsible to Eugene B. Smith, dba Eugene B. Smith & Co. for the loss by fire of said 39 bales of cotton by reason of its warehouse receipts, and that if it further be found that this defendant's policy is effective for the benefit of Eugene B. Smith, dba Eugene B. Smith & Co., then by reason of the aforesaid clause of excess insurance and the specific insurance held by Eugene B. Smith, dba Eugene B. Smith & Co. with National Fire Insurance Company through the Cotton Insur-

ance Association, this defendant is not liable, and the plaintiff or its assignor, Eugene B. Smith, dba Eugene B. Smith & Co., or Cotton Insurance Association, or the National Fire Insurance Company, are not entitled to recover from Home Insurance Company or Eloy Gin Corporation.

XV.

Further answering plaintiff's amended complaint, this defendant alleges that if it be held that the plaintiff or its assignor is entitled to recover against this defendant notwithstanding the allegations herein set forth, it is alleged that it is not entitled to recover on the grounds that this defendant's policy contained a contributing insurance clause reading as follows:

"5. 'Contributing Insurance Clause.' Permission is granted for other insurance written upon the same plan, terms, conditions, and provisions as those contained in the form attached to this policy, i.e., Insurance written under this provisional reporting form. The insurance under this policy is in accordance with its printed conditions or riders, shall contribute only with other insurance as herein above defined, against any peril insured by this policy."

and that by reason thereof, if this defendant be found liable to Eloy Gin Corporation, then it is only liable under its contributing insurance clause, the exact amount of which is unknown, as this defendant is not advised of the amount or limitations of the policy held by Eugene B. Smith, dba

Eugene B. Smith & Co., issued by National Fire Insurance Company through the Cotton Insurance Association. That said policy of insurance of this defendant further provides:

“This company shall not be liable for a greater portion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not, and whether collectible or not.”

XVI.

That by reason of the matters herein stated, including the allegations pertaining to the assumption of risk and that the plaintiff is not the real party in interest, the plaintiff is not entitled to recover on its complaint against Home Insurance Company or Eloy Gin Corporation or either of them.

Wherefore, this defendant prays that the plaintiff take nothing by its amended complaint, and that this defendant recover judgment against the plaintiff, together with its costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Defendant,
The Home Insurance
Company.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 28, 1950.

[Title of District Court and Cause.]

SEPARATE ANSWER OF
ELOY GIN CORPORATION

Comes Now the defendant Eloy Gin Corporation, by its attorneys, Theodore G. McKesson and Robert H. Renaud, and in answer to plaintiff's amended complaint admits, denies and alleges:

This defendant is not advised of the corporate status of or of the assignment of said claim by Eugene B. Smith, an individual, to Eugene B. Smith & Co., and therefore denies same upon information and belief and requires strict proof thereof. Defendant admits that Eloy Gin Corporation is an Arizona corporation, and admits that the Home Insurance Company is a New York corporation. Admits that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

I.

Admits paragraph I of said amended complaint in all respects except insofar as it was alleged that Eugene B. Smith, dba Eugene B. Smith & Co. was the legal owner of 40 bales of cotton on January 25, 1946, and therefore denies same on information and belief and requires strict proof thereof.

II.

Admits that prior to January 25, 1946, this defendant obtained from the defendant Home Insurance Company a policy of fire insurance on cotton in its gin yard, but denies that said policy of fire

insurance insured this defendant for the benefit of Eugene B. Smith & Co. and others having cotton in the possession of this defendant and holding its receipts therefor against loss and damage by fire and other hazards, and in that regard this defendant alleges that the insuring agreement of the said Home Insurance Company in said policy of fire insurance, among other things, provided:

“Loss, if any, to be adjusted with the Insured named herein and payable to Insured on merchandise of every description (except as hereinafter excluded) consisting principally of cotton by-products, materials and supplies...”

That said policy of fire insurance provided that any losses must be adjusted with Eloy Gin Corporation and payable to Eloy Gin Corporation and not to other persons or corporations.

III.

In answer to paragraph III of said amended complaint, this defendant admits that on or about January 25, 1946, a fire occurred in the premises of this defendant where said bales of cotton were stored and destroyed 39 bales of the said 40 bales of cotton. Denies that said bales of cotton had an actual cash value at the date of said loss of \$4,736.85, and in that regard alleges that the reasonable cash market value of said cotton at said time was \$4,028.61.

IV.

In answer to paragraph IV this defendant admits that at the time of said loss by fire the said

39 bales of cotton were in the possession of this defendant under the warehouse receipts above described. Denies that the same were protected by the insurance policy of the Home Insurance Company.

V.

Denies the allegations of paragraph V thereof.

VI.

In answer to paragraph VI, this defendant admits that after the time of said loss by fire Eugene B. Smith dba Eugene B. Smith & Co. made a claim against this defendant through the insurance carrier of Eugene B. Smith & Co. for the amount of said loss and damage to the 39 bales of cotton. Admits that Eloy Gin Corporation denied liability and refused to pay said loss. Denies that the plaintiff or its assignee made proof of loss with the Home Insurance Company for said loss of cotton by fire, and in that regard alleges that Eugene B. Smith & Co. could only make a claim for said loss by fire against Eloy Gin Corporation.

VII.

In answer to paragraph VII, this defendant is not advised of the truth or falsity of the allegations thereof and therefore denies same upon information and belief and requires strict proof thereof.

VIII.

Further answering said amended complaint this defendant alleges that the plaintiff or its assignee Eugene B. Smith & Co. are not the real parties in

interest in said litigation, in that Eugene B. Smith dba Eugene B. Smith & Co. held a policy of marine fire insurance which was in full force and effect, being policy No. OC-58587 of the National Fire Insurance Company, which was in full force and effect at the time of said fire on the premises of this defendant. That pursuant to said policy of fire insurance the said company paid the assignee of plaintiff herein the full amount of said loss by fire through the Cotton Insurance Association and became subrogated to the rights which Eugene B. Smith might have against this defendant.

IX.

Further answering said amended complaint, this defendant alleges that same fails to state a claim against this defendant upon which relief may be granted.

X.

Further answering said amended complaint, this defendant alleges that on or about the 7th day of November, 1945, Eloy Gin Corporation as seller and Eugene B. Smith & Co. as buyer entered into two separate written contracts for the purchase and sale of cotton, the first contract being No. P-200, dated November 7, 1945, covering 300 bales of cotton, and the second contract, No. P-201, covering 1,000 bales of cotton; that said contracts were identical with the exception that one covered 300 bales of cotton and the other 1,000 bales of cotton. That among other things each of said written contracts provided in substance that the seller sold and

the buyer bought the respective bales of cotton for certain prices on the terms and conditions set forth, and provided as follows:

“Insurance at sellers risk until payment completed.

“Reimbursement Sight Draft, gin-yard receipts attached, also Smith/Doxey cards, Draw on Eugene B. Smith & Co., care Valley National Bank, Phoenix.”

XI.

Further answering said amended complaint, this defendant alleges that each of said contracts for the purchase and sale of cotton was completed in full in accordance with its terms. As cotton was ginned and baled, the bales were marked and gin yard receipts issued for each bale. Sight drafts were drawn on Eugene B. Smith & Company in care of The Valley National Bank, Phoenix, with gin yard receipts attached thereto, and when the drafts were paid the gin yard receipts were delivered by The Valley National Bank, Phoenix, to Eugene B. Smith & Co. The bales of cotton remained in the possession of Eloy Gin Corporation until removed from its possession by surrender of gin yard receipts and delivery of the cotton to the one presenting the receipts. All of said cotton was paid for in accordance with the terms of said agreements and all delivered, and the gin yard receipts were surrendered with the exception of 39 gin yard receipts, prior to January 25, 1946.

XII.

Further answering said amended complaint, this defendant alleges that the 39 bales of cotton alleged to have been destroyed by fire and upon which it alleges it held gin receipts, were paid for more than a month before the date of said fire by draft drawn by the defendant Eloy Gin Corporation upon the plaintiff through The Valley National Bank, and that in accordance with said contracts the payment of all of said 1300 bales of cotton had been completed on or before the date of said fire, and that therefore all risk on said cotton was thereafter upon the buyer, assignee of the plaintiff herein, by special contract. That the plaintiff herein and its assignee by special contract with this defendant relieved this defendant of any and all liability to plaintiff and its assignee for any loss sustained by said fire and that same was assumed by Eugene B. Smith & Co., assignee of plaintiff.

XIII.

Further answering said amended complaint, this defendant alleges that it made no proof of loss or claim against the Home Insurance Company by reason of the destruction of the 39 bales of cotton on which the plaintiff's assignee was alleged to have gin receipts, for the reason that this defendant had contracted with plaintiff's assignee that upon payment of the bale receipts through The Valley National Bank, the plaintiff's assignee assumed all liability for the destruction of said cotton by fire. That more than sixty days has elapsed since said

fire, within which this defendant could file a claim under its policy with the Home Insurance Company, and more than one year has elapsed since said fire, and therefore any claims of this defendant against the Home Insurance Company are barred by the statute of limitations, and that if the said Home Insurance Company were liable to Eloy Gin Corporation or to the plaintiff that any cause of action by the plaintiff or its assignee against the Home Insurance Company is barred by the statute of limitations, as the New York Standard Form of Fire Insurance adopted by the Legislature of the State of Arizona, among other things, provides:

“No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.”

Wherefore, this defendant prays that the plaintiff take nothing by its said amended complaint, that this defendant recover judgment against the plaintiff, and for its costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,

Attorneys for the Answering
Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1950.

In the United States District Court
For the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District
Judge, Presiding.

MINUTE ENTRY OF
MONDAY, OCTOBER 23, 1950

On motion of Joseph S. Jenckes, Jr., counsel for defendant, Eloy Gin Corporation, over objections of Theodore G. McKesson, counsel for defendant, Home Insurance Company and his statement counsel for plaintiff has no objection,

It Is Ordered that the defendant Eloy Gin Corporation be allowed to file Motion to Dismiss, Amended Answer and Cross-Claim herein.

In the United States District Court
For the District of Arizona

No. Civ. 1135

EUGENE B. SMITH & CO., INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME IN-
SURANCE COMPANY,

Defendants.

ELOY GIN CORPORATION,

Cross-Claimant,

vs.

HOME INSURANCE COMPANY,

Cross-Defendant.

MOTION TO DISMISS, AMENDED ANSWER
AND CROSS-CLAIM OF ELOY GIN COR-
PORATION

Motion to Dismiss

Comes Now, defendant Eloy Gin Corporation and moves to dismiss the amended complaint of the plaintiff for the reasons that the court lacks jurisdiction over the subject matter and the complaint fails to state claim upon which relief can be granted against this defendant.

Answer

Without waiving the foregoing motion to dismiss, and only in the event that the same is denied,

defendant Eloy Gin Corporation for its answer to plaintiff's amended complaint admits, denies and alleges as follows:

First Defense

Alleges that the amended complaint fails to state a claim upon which relief can be granted.

Second Defense

I.

Admits that this defendant is an Arizona corporation, that defendant Home Insurance Company is a New York corporation, that plaintiff is a Texas corporation, and that the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars (\$3,000.00). Admits the allegations of paragraphs I and II.

II.

Admits the allegations of paragraph III except the allegations that the actual cash market value of said cotton was Four Thousand Seven Hundred Thirty-Six and 85/100 (\$4,736.85) Dollars, which allegation defendant denies and in this respect defendant alleges that the reasonable market value of said cotton at said time was Four Thousand Twenty-Eight and 61/100 (\$4,028.61) Dollars.

III.

Answering paragraph IV, defendant admits that at the time said cotton was destroyed by fire it was in the possession of this defendant and was pro-

tected by the insurance of the Home Insurance Company to the extent provided in said policy of insurance.

IV.

Answering paragraph V, defendant denies that as a result of said loss and damage by fire this defendant became liable to Eugene B. Smith dba Eugene B. Smith and Company in any amounts whatsoever and in this respect defendant alleges that prior to the destruction of said cotton as aforesaid the same had been purchased by the said Eugene B. Smith dba Eugene B. Smith and Company from this defendant; that the purchase price thereof had been paid and title thereto had passed to the said Eugene B. Smith; that said cotton was at such time in the possession of defendant as a gratuitous bailee and that all risk of loss or damage thereto by fire or other casualty had been assumed by the said Eugene B. Smith.

V.

Admits the allegations of paragraph VI.

VI.

Answering paragraph VII, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained.

Third Defense

Defendant alleges that at the time of the destruction of aforesaid cotton by fire the plaintiff had

secured and there was in force and effect a policy of marine fire insurance issued by National Fire Insurance Company, and pursuant to said policy of fire insurance said company paid to the said Eugene B. Smith the full amount of the loss sustained by the said Eugene B. Smith as a result of said fire; that by reason thereof plaintiff, or its predecessor in interest, sustained no loss or damage as a result of said fire and is not the real party in interest herein.

Fourth Defense

Defendant alleges that prior to said fire the cotton referred to in plaintiff's complaint was purchased by the said Eugene B. Smith dba Eugene B. Smith and Company from defendant; that the purchase price thereof had been paid and title thereto had passed to the said Eugene B. Smith; that at the time of said fire said cotton was in the possession of defendant as a gratuitous bailee; that at the time of said fire defendant was with respect to its possession of said cotton exercising that degree of care which was imposed upon it by law in its capacity as a gratuitous bailee.

Fifth Defense

Defendant alleges that at the time of said fire defendant was with respect to its possession of said cotton exercising that degree of care that a reasonably careful owner of similar goods would exercise.

Cross-Claim

Comes Now defendant and cross-claimant, Eloy Gin Corporation, and for its cross-claim against Home Insurance Company, defendant and cross-defendant alleges:

I.

Cross-claimant is an Arizona corporation; cross-defendant is a New York corporation.

II.

On or about the 25th day of January, 1946, cross-claimant was in possession of thirty-nine (39) bales of cotton belonging to Eugene B. Smith dba Eugene B. Smith and Company, which were on or about said date destroyed by fire. Prior to January 25th, 1946, cross-claimant had secured from cross-defendant, and there was in force and effect at the time of the destruction of said cotton by fire, a policy of fire insurance which provided among other things that cross-defendant would pay to cross-claimant the amount of the loss or damage which might be sustained by the owners of any cotton in the possession of cross-claimant and for which loss cross-claimant might be liable; by reason thereof cross-defendant is liable to cross-claimant for any and all sums which may be determined to be due from cross-claimant to plaintiff herein.

Wherefore, defendant and cross-claimant prays:

1. That plaintiff take nothing by its complaint and that this defendant have and recover of and

from plaintiff its costs of suit incurred and expended herein;

2. That in the event judgment is rendered herein in favor of plaintiff and against defendant and cross-claimant, judgment in like amount be rendered in favor of cross-claimant and against cross-defendant, together with cross-claimant's costs and a reasonable attorneys' fee;

3. That defendant and cross-claimant have such other and further relief as the court may deem proper.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. S. JENCKES, JR.,
Attorneys for Defendant and Cross-Claimant, Eloy
Gin Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed October 23, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS AND PLEA IN BAR
AND ANSWER OF CROSS-DEFENDANT
TO CROSS-CLAIM

MOTION TO DISMISS AND PLEA IN BAR

Comes Now the cross-defendant Home Insurance Company, by its attorneys, Theodore G. McKesson and Robert H. Renaud, and in appearance to the

cross-claim of Eloy Gin Corporation filed on or about October 23, 1950, moves the Court:

For an order dismissing said cross-claim upon the grounds and for the reasons:

(1) That the same fails to state a claim upon which relief may be granted against the cross-defendant.

(2) That the cross-claim is based upon a contract of insurance with the cross-defendant Home Insurance Company on the New York standard form, and the loss is alleged to have occurred on January 25, 1946, and no action was filed against the cross-defendant until on or about October 23, 1950, and it is therefore barred by the statute of limitations.

(3) That it is not shown that the Eloy Gin Corporation ever filed a proof of loss for said alleged destruction by fire of the 39 bales of cotton within the time provided by said policy of insurance, and therefore any claims on said policy are barred.

Wherefore, cross-defendant prays that said cross-claim be dismissed, that it recover judgment against Eloy Gin Corporation and for costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Cross-Defendant Home Insurance
Company.

Answer

In the event the foregoing motion to dismiss and plea in bar are denied or overruled, but without waiving same, in further appearance to Eloy Gin Corporation's cross-claim against Home Insurance Company, cross-defendant admits, denies and alleges as follows:

I.

In answer to paragraph I thereof, cross-defendant admits that Eloy Gin Corporation is an Arizona corporation, and admits that Home Insurance Company is a New York corporation authorized to do business in the State of Arizona.

II.

In answer to paragraph II, not being advised of the truth or falsity of the allegation that 39 bales of cotton belonging to Eugene B. Smith & Company were destroyed by fire on January 25, 1946, at the Eloy Gin Corporation gin yard, cross-defendant therefore denies same upon information and belief and requires strict proof thereof. Admits that on and prior to the 25th day of January, 1946, there was in full force and effect at the time of a fire occurring at the Eloy Gin Corporation gin yard on said date a policy of fire insurance on the New York standard form insuring Eloy Gin Corporation as follows:

“On merchandise of every description * * * consisting principally of cotton by-products, materials and supplies manufactured or in

process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and (Provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage or repairs, but loss thereon shall be adjusted with and payable to the insured named in this policy; * * *

III.

Further answering said cross-claim, cross-defendant denies each and every allegation not herein expressly admitted, and alleges that same fails to state a claim against the cross-defendant upon which relief may be granted.

IV.

Further answering said cross-claim, cross-defendant alleges, in complete bar of any relief in behalf of Eloy Gin Corporation, as follows: That Home Insurance Company is informed and believes that the alleged 39 bales of cotton located in the Eloy Gin Corporation's gin yard had, by special agreement between Eloy Gin Corporation and Eugene B. Smith & Company been sold to Eugene B. Smith & Company, and that said 39 bales of cotton had been paid for in accordance with said agreement, and that the risk of loss by fire to said cotton was

assumed by Eugene B. Smith & Company upon the payment of the drafts covering said 39 bales of cotton, and that pursuant to said agreement Eugene B. Smith & Company had marine insurance under a policy with National Fire Insurance Company protecting them from any and all loss they might incur by reason of the destruction of any cotton they might legally have title to.

V.

Further answering said cross-claim, cross-defendant alleges that Eugene B. Smith & Company collected the full loss under its policy of marine insurance from the National Fire Insurance Company for the destruction of said 39 bales of cotton.

VI.

Further answering said cross-claim, cross-defendant alleges that Eloy Gin Corporation at no time ever filed a proof of loss with Home Insurance Company, within sixty days as provided in said policy of insurance, or at any other time, for the payment of the alleged loss of the 39 bales of cotton, and in that regard alleges that said policy of insurance provides, among other things, as follows:

“ . . . and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured . . . ”

That no proof of loss was ever filed and no extension in writing ever given by Home Insurance Company.

VII.

Further answering said cross-claim, cross-defendant alleges that its policy of insurance further provides:

“No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.”

That no action was ever taken by Eloy Gin Corporation against Home Insurance Company until the 23rd day of October, 1950, and that Eloy Gin Corporation has never filed a proof of loss and has not complied with the terms of the policy, and any action on this cross-claim is barred, first, on the ground that no proof of loss was ever filed and the policy provisions were not complied with, and, second, action was not commenced within twelve months next after inception of the loss.

Wherefore, the cross-defendant prays that Eloy Gin Corporation take nothing by its cross-claim, and that it have judgment against Eloy Gin Corporation, together with costs incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Cross-Defendant, Home Insurance
Company.

Notice

To Eugene B. Smith & Co., Inc., Plaintiff, and to their attorneys, Fennemore, Craig, Allen & Bledsoe, and to Eloy Gin Corporation, Cross-Claimant, and to their attorneys, Evans, Hull, Kitchel & Jenckes:

You will please take notice that the cross-defendant Home Insurance Company will, on the 27th day of October, 1950, at the hour of 10:00 o'clock a.m., urge the foregoing Motion to Dismiss and Plea in Bar.

Dated this 24th day of October, 1950.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Cross-Defendant Home Insurance
Company.

Receipt of copy acknowledged.

[Endorsed]: Filed October 25, 1950.

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT FOR
DAMAGES BY REASON OF FIRE LOSS

First Cause of Action

Plaintiff is a corporation organized and existing under the laws of the State of Texas. The defendant,

Eloy Gin Corporation, is a corporation organized and existing under the laws of the State of Arizona. The defendant, Home Insurance Company, is a corporation organized and existing under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

I.

On and prior to January 25, 1946, Eugene B. Smith doing business as Eugene B. Smith & Co. was the legal owner of forty (40) bales of cotton which were in the possession of the defendant, Eloy Gin Corporation, at its place of business at Eloy, Arizona, and at such time Eugene B. Smith dba. Eugene B. Smith & Co. held and owned for each of said 40 bales of cotton a receipt issued by the defendant, Eloy Gin Corporation, and acknowledging receipt of one bale of cotton stored in said defendant's gin yard. Each of said receipts contained the weight of the respective bale of cotton, the date of the issuance of the receipt, the name of the person to whom the receipt was issued and for whose account said receipt was issued, and contained, among others, the following provisions:

“That said bale of cotton has been insured while stored as aforesaid under this receipt against direct loss and/or damage by fire except as limited and provided in insurance policy covering the same.

“This company will deliver said cotton in said yard to said depositor or order upon surrender of this original receipt, properly endorsed, and the payment of all charges against said cotton.”

Each of said receipts was duly endorsed and delivered to Eugene B. Smith dba. Eugene B. Smith & Co. by defendant, Eloy Gin Corporation.

II.

That defendant, Eloy Gin Corporation, failed to insure any of the said bales of cotton against direct loss or damage by fire, although said defendant did have a policy of insurance with Home Insurance Company which, by its terms, excluded the bales of cotton herein involved.

III.

That on or about January 25, 1946, a fire occurred at the premises of the Eloy Gin Corporation, where said bales of cotton were stored, which damaged and destroyed 39 of said 40 bales of cotton, and at the time of said total destruction of said bales of cotton they had the actual cash market value, at the time and place of said fire, of \$4,736.85.

IV.

At the time of said loss and damage by fire to said bales of cotton, they were in the possession of defendant, Eloy Gin Corporation, under said receipts above described.

V.

As a result of said loss and damage by fire the defendant, Eloy Gin Corporation, became liable to Eugene B. Smith dba. Eugene B. Smith & Co. in the amount of said damage, with interest at the legal rate from the date of said fire.

VI.

After said fire occurred Eugene B. Smith, dba. Eugene B. Smith & Co., duly made claim against the Eloy Gin Corporation for the amount of said loss and damage, and defendant Eloy Gin Corporation denied liability upon said claim and has refused to pay the loss and damage, or any part thereof.

VII.

That thereafter and on the 1st day of July, 1946, plaintiff was formed as a corporation under the laws of the State of Texas, and thereafter duly qualified to do business as a foreign corporation within the State of Arizona; that plaintiff upon its incorporation acquired all of the assets of Eugene B. Smith dba. Eugene B. Smith & Co., including the cause of action sought to be enforced herein and assumed all of the liabilities and obligations of Eugene B. Smith dba. Eugene B. Smith & Co., including the obligation to enforce the cause of action set forth herein.

Wherefore, plaintiff prays judgment against defendant Eloy Gin Corporation for the sum of \$4,736.85 with legal interest from January 1, 1946, and for such other relief to which it may be entitled.

Second Cause of Action

I.

Plaintiff adopts the preliminary statements of the first cause of action by reference.

II.

Plaintiff adopts the paragraph I of the first cause of action by reference.

III.

That Eloy Gin Corporation insured said bales of cotton by a policy of fire insurance with defendant Home Insurance Company.

IV.

That in and by said policy of insurance it was provided, among other things, that any loss thereunder should be settled with and payable solely to Eloy Gin Corporation and defendant Eloy Gin Corporation thereby became obligated to collect the proceeds of said policy for the benefit of plaintiff Eugene B. Smith & Co.

V.

That said policy of insurance required proof of loss to be made within sixty (60) days of the date of loss and required that action thereunder be brought within one (1) year of the date of loss.

VI.

Plaintiff incorporates by reference paragraph III of the first cause of action.

VII.

Plaintiff incorporates by reference paragraph IV of the first cause of action.

VIII.

Eloy Gin Corporation failed to make proof of loss as required by said policy within sixty (60) days of the date of loss and failed to bring action within one (1) year as provided in said policy of insurance.

IX.

As a result of said loss and damage by fire and the failure of the defendant Eloy Gin Corporation to collect the insurance thereon for the benefit of Eugene B. Smith & Co., Eloy Gin Corporation became liable to plaintiff in the amount of said damage, with interest at the legal rate from the date of said fire.

X.

Plaintiff incorporates paragraph VI of the first cause of action by reference.

XI.

Plaintiff incorporates paragraph VII of the first cause of action by reference.

XII.

Plaintiff alleges in the alternative that defendant Home Insurance Company waived the failure of defendant Eloy Gin Corporation to make proof of loss and bring suit within one (1) year as provided in said policy of insurance.

Wherefore plaintiff prays judgment against defendants for the amount of said loss and damage,

with legal interest from January 1, 1946, and for such other relief as may be meet in the premises.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

[Endorsed]: Filed October 27, 1950.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District
Judge, Presiding.

MINUTE ENTRY OF
FRIDAY, OCTOBER 27, 1950

This case comes on regularly for trial this date. Richard Fennemore, Esquire, appears as counsel for the plaintiff. Joseph S. Jenckes, Jr., is present for defendant Eloy Gin Corporation and Theodore G. McKesson, Esquire, is present for defendant, The Home Insurance Company.

Louis L. Billar is present as official reporter.

It Is Ordered that the record show that Motion of defendant Eloy Gin Corporation to Dismiss Amended Complaint, Motion of defendant, The Home Insurance Company, to Dismiss Amended Complaint and Motion of defendant, The Home

Insurance Company to Dismiss Cross-Claim, and Plea in Bar are submitted to the court and the court reserves ruling thereon, and that by stipulation of counsel, the complaint is predicated upon a cause of action on contract and then will be no question of negligence on part of Eloy Gin Corporation in the case.

Plaintiff's Case

The following plaintiff's exhibits are now admitted in evidence:

- 1 Stipulation of Facts.
- 1-A Copy of Contract.
- 1-B Copy of Contract.
- 1-C Gin yard receipts.
- 1-D Fire Insurance policy.
- 1-E Marine fire insurance policy.
- 1-F Loan draft.
- 1-G Loan agreement.

Charles Churchill is now sworn and examined on behalf of the plaintiff.

Counsel for plaintiff makes offer of proof and counsel for both defendants object thereto.

It Is Ordered that the objections be sustained.

Counsel now stipulate that value of cotton in this action is \$4,028.61 in lieu of \$4,736.85.

Plaintiff's exhibit 2, Deposition of T. S. McCorkle, is now admitted in evidence.

George J. Bolt is now sworn and examined on behalf of the plaintiff.

Theodore G. McKesson is now sworn and examined on behalf of the plaintiff.

And thereupon the plaintiff rests.

Counsel for defendant Eloy Gin Corporation now moves that court enter judgment for said defendant and that plaintiff take nothing by its complaint against said defendant.

Counsel for plaintiff moves for leave to amend complaint to conform to the evidence with respect to Eloy Gin Corporation.

It Is Ordered that Plaintiff's Motion for Leave to Amend be and it is granted.

Counsel for defendant The Home Insurance Company now moves for judgment against plaintiff on ground that complaint fails to state claim and evidence fails to state claim, and there is no privity of interest between defendants.

Defendant Eloy Gin Corporation rests.

And thereupon, at 11:30 o'clock a.m., It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m., to which time the respective parties and counsel are excused.

Subsequently, at 2:00 o'clock p.m., the parties and respective counsel present pursuant to recess, further proceedings of trial are had as follows:

Counsel for plaintiff now submits proposed amendment to complaint and counsel for defendant Eloy Gin Corporation states his objections thereto.

It Is Ordered that said amendments be and they are allowed.

Both sides rest.

Counsel for defendant Home Insurance Company now moves for judgment on first cause of action and for judgment on second cause of action and for

judgment against Eloy Gin Corporation on cross-claim and states his grounds therefor.

It Is Ordered that the record show that this case is submitted on briefs and that plaintiff is allowed twenty days to file opening brief; the defendants twenty days thereafter to answer and the plaintiff ten days to reply.

[Title of District Court and Cause.]

MOTION TO DISMISS AND PLEA IN BAR,
AND ANSWER TO PLAINTIFF'S SEC-
OND CAUSE OF ACTION IN ITS
SECOND AMENDED COMPLAINT

Motion to Dismiss and Plea in Bar

Comes Now the defendant Home Insurance Company, by its attorneys, Theodore G. McKesson and Robert H. Renaud, and in appearance to plaintiff's second amended complaint and as to the second cause of action moves the Court for the following order:

To dismiss said second cause of action against this defendant upon the following grounds and reasons:

(a) That the second cause of action of said second amended complaint fails to state a claim against this defendant upon which relief may be granted.

(b) That said second cause of action of said second amended complaint is barred by the statute of limitations.

Wherefore, this defendant prays that the second cause of action of the second amended complaint be dismissed as against this defendant, that this defendant have judgment against the plaintiff, together with its costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,

Attorneys for the Defendant,

Home Insurance Company.

Answer to Second Cause of Action

In the event the foregoing motion is overruled, without waiving same, in answer to the second cause of action in the second amended complaint, the defendant Home Insurance Company, by its attorneys, Theodore G. McKesson and Robert H. Renaud, admits, denies and alleges:

I.

Admits the allegations of paragraph I thereof, being the preliminary statements of the first cause of action.

II.

Admits the allegations of paragraph II thereof, which is by reference paragraph I of the first cause of action.

III.

In answer to paragraph III this defendant admits that it had a policy of insurance in effect with Eloy Gin Corporation covering cotton and farm

products it owned and cotton of others for which it was legally liable as bailee provided it had assumed the legal risk thereof by fire, and more particularly this defendant alleges that its said policy of insurance provided as follows:

“This policy insures Eloy Gin Corporation.

“Loss, if any, to be adjusted with the Insured named therein and payable to Insured on merchandise of every description * * * consisting principally of cotton by-products, materials and supplies manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and (Provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage or repairs, but loss thereon shall be adjusted with and payable to the insured named in this policy; * * *”

IV.

In answer to paragraph IV thereof, this defendant admits that said policy of insurance provides that any loss should be settled with and payable solely to Eloy Gin Corporation. This defendant denies that Eloy Gin Corporation became legally obligated to collect the proceeds of said policy for the benefit of Eugene B. Smith & Company, as it

had not contracted to insure plaintiff's cotton after the plaintiff had paid for the cotton by drafts with gin yard receipts and grade cards attached, and in that regard this defendant alleges and has admitted in the Stipulation of Facts in this cause that Eugene B. Smith & Company had paid for all of said cotton prior to said fire and had insured its said cotton with National Fire Insurance Company prior to the date of said fire, and that plaintiff's Exhibits 1-A and 1-B conclusively show on their face that risk of loss by fire was upon Eugene B. Smith & Company on January 25, 1946, the date of said fire, as it had paid for said cotton and had taken legal delivery of same.

V.

Admits the allegations of paragraph V thereof.

VI.

Admits paragraph VI thereof, which by reference adopts paragraph III of the first cause of action, but in that regard alleges that it was stipulated at the time of trial that the market value of said cotton at the date of said fire was \$4,028.61.

VII.

In answer to paragraph VII thereof, which by reference adopts paragraph IV of the first cause of action, this defendant admits the allegations thereof.

VIII.

Admits the allegations of paragraph VIII thereof.

IX.

Denies the allegations of paragraph IX by reason of the facts herein alleged and alleged in other pleadings in behalf of Home Insurance Company in appearance to plaintiff's first amended complaint and the Stipulation of Facts and Exhibits thereof attached introduced in evidence by the plaintiff.

X.

Admits paragraph X thereof, which adopts by reference paragraph VI of the first cause of action.

XI.

Admits paragraph XI thereof, which adopts by reference paragraph VII of the first cause of action.

XII.

In answer to paragraph XII thereof, this defendant denies that it waived the failure of Eloy Gin Corporation to make proof of loss and to bring suit within one year, as provided in said policy of insurance.

XIII.

Further answering said second cause of action of the second amended complaint, this defendant alleges that same fails to state a claim upon which relief may be granted against this defendant.

XIV.

Further answering said second cause of action of the second amended complaint, this defendant alleges that said second cause of action is barred

by the statute of limitations, as not being instituted within one year after the date of said loss.

Wherefore, the defendant Home Insurance Company prays that the plaintiff take nothing against it by its second cause of action, and that it recover judgment against the plaintiff, together with costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Defendant,
Home Insurance Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 3, 1950.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District
Judge, Presiding.

MINUTE ENTRY OF
FRIDAY, MARCH 30, 1951

It Is Ordered that plaintiff, Eugene B. Smith & Company, Inc., take nothing by its complaint, and the same is hereby dismissed.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact

From the Stipulation of Facts and the evidence introduced at the trial, the Court finds the following facts:

I.

a. Eugene B. Smith & Co., Inc., was at all times a corporation organized and existing under the laws of the State of Texas and was not authorized to do business in Arizona until August 14, 1946.

b. Eloy Gin Corporation is and was at all times mentioned in plaintiff's second amended complaint a corporation organized and existing under the laws of the State of Arizona.

c. The Home Insurance Company is an insurance corporation organized under the laws of the State of New York and authorized to a general insurance business in the State of Arizona.

d. The amount in controversy herein is in excess of \$3,000.00, to wit: The sum of \$4,028.61 together with interest at the rate of six per cent (6%) per annum from January 25, 1946.

e. The plaintiff claimed it was entitled to recover on an insurance policy contract for the loss of 39 bales of cotton destroyed by fire on the defendant Eloy Gin Corporation's gin yard of the value of \$4,028.61, on January 25, 1946. The defendant Eloy Gin Corporation claimed that the plaintiff, by written agreement, had assumed any

loss by fire of any cotton on its gin yard which had been paid for, and the defendant Home Insurance Company claimed that its policy of insurance did not inure to the benefit of Eugene B. Smith & Co., Inc., and that there was no privity of interest between Home Insurance Company and Eugene B. Smith & Co., and that it was only liable under its insurance policy to Eloy Gin Corporation, had Eloy Gin Corporation been responsible for loss by fire of cotton on its gin yard with Eugene B. Smith & Co., Inc., on January 25, 1946.

II.

Plaintiff and the defendants entered into a Stipulation of Facts consisting of four pages and seven paragraphs under date of October 24, 1950, together with seven exhibits numbered A to G, inclusive. Said Stipulation of Facts and the Exhibits A to G, inclusive, were introduced in evidence by the plaintiff as Plaintiff's Exhibits 1-A to 1 in evidence.

III.

Plaintiff had, by written agreement, pursuant to paragraph (2) of the Stipulation of Facts, assumed all risk of loss by fire of any cotton on Eloy Gin Corporation's gin yard that it had theretofore paid for, and that at the date of said fire on January 25, 1946, there were 39 bales of cotton already paid for by the plaintiff and still remaining on the defendant Eloy Gin Corporation's gin yard which it had insured under its marine insurance policy with National Fire Insurance Company.

IV.

Eugene B. Smith & Co., Inc., suffered no loss by reason of the destruction of said 39 bales of cotton by fire, as it was reimbursed and indemnified by loan receipts for said loss by its insurance carrier, National Fire Insurance Company, and had by its written agreement relieved Eloy Gin Corporation from any liability for any cotton on Eloy Gin Corporation's gin yard that had been paid for in the event of fire.

V.

The loan receipt taken by National Fire Insurance Company from the plaintiff is legal. However, the plaintiff cannot recover, nor can National Fire Insurance Company recover, from Eloy Gin Corporation by reason of the plaintiff's contract to assume any liability for the destruction of the cotton by fire that it had paid for.

VI.

The 39 bales of cotton evidenced by gin receipts and referred to in the evidence and the Stipulation of Facts were all paid for prior to the date of the fire.

VII.

Eugene B. Smith & Co., Inc., had no contractual relations with the defendant Home Insurance Company, and the Home Insurance Company's standard New York form of fire insurance policy, introduced in evidence, was for the sole benefit of Eloy Gin Corporation and did not inure or react in favor of any other person or corporation, including

the plaintiff or its assignee, as said policy contains, among other things, the following provision:

“This policy insures Eloy Gin Corporation. Loss, if any, to be adjusted with the Insured named herein and payable to Insured on merchandise of every description (except as hereinafter excluded) consisting principally of cotton by-products, materials and supplies * * * within the limits of the State of Arizona.”

VIII.

The New York standard form of fire insurance policy of Home Insurance Company provided that proof of loss should be filed with the defendant Home Insurance Company within sixty (60) days after the loss unless the time was extended in writing. Eloy Gin Corporation did file proof of loss with the defendant Home Insurance Company for other cotton, but did not file proof of loss for the 39 bales of cotton for which the plaintiff is seeking to recover the value at any time.

IX.

Eloy Gin Corporation did not bring an action against Home Insurance Company, nor did the plaintiff bring an action against the defendant Home Insurance Company for any loss of the 39 bales of cotton within twelve months from the date of the loss, as provided in the New York standard form of fire insurance policy, adopted by the laws of the State of Arizona, which said policy, among other things, provides:

“No suit or action on this policy for the

recovery of any claim shall be sustainable in any court of law or equity unless all requirements of this policy shall have been complied with, and unless commenced within twelve months after inception of the loss.”

Conclusions of Law

From the foregoing facts, the Court concludes as matters of law:

(1) The court has jurisdiction of the parties and of the subject matter under the provisions of Sections 1332, 1335 and 1441, of Title 28 of the United States Code.

(2) The plaintiff is not entitled to recover anything on its amended complaints from the defendant Eloy Gin Corporation or from the defendant Home Insurance Company.

(3) The defendant Eloy Gin Corporation is not entitled to recover on its cross-claim against the defendant Home Insurance Company.

(4) The plaintiff Eugene B. Smith & Co., Inc., not being a party to the contract of insurance between Eloy Gin Corporation and Home Insurance Company, cannot maintain an action thereon.

(5) The plaintiff Eugene B. Smith & Co., Inc., by written agreement with the defendant Eloy Gin Corporation, contracted to assume any loss by fire of any cotton which it had paid for prior to the date of the fire, and as to the alleged damage in this action the Court concludes that the 39 bales of cotton of the approximate value of \$4,028.61 were

paid for by the plaintiff at a date prior to the date of the fire.

Settled, Adopted and Signed this 18th day of April, 1951.

/s/ DAVE W. LING,

United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 18, 1951.

In the District Court of the United States
for the District of Arizona
No. Civil 1135

EUGENE B. SMITH & CO., INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME IN-
SURANCE COMPANY,

Defendants.

JUDGMENT UPON THE ISSUES

Upon due consideration of the pleadings, the admissions of the parties, the Stipulation of Facts, and oral and documentary evidence introduced at the time of trial, and the Findings of Fact and Conclusions of Law heretofore settled, signed and filed herein, and the Court being fully advised in the premises, it is

Ordered, Adjudged and Decreed:

(1) That the plaintiff take nothing by its action as against the defendant Eloy Gin Corporation or the defendant Home Insurance Company, or either of them.

(2) That the defendant Eloy Gin Corporation take nothing by reason of its cross-claim against the defendant Home Insurance Company.

(3) That the defendant Home Insurance Company do have and recover of and from the plaintiff Eugene B. Smith & Co., Inc., the sum of \$175.70 as and for its costs taxed and allowed herein.

(4) That the defendant Eloy Gin Corporation do have and recover of and from the plaintiff Eugene B. Smith & Co., Inc., the sum of \$. as and for its costs taxed and allowed herein.

Done in Open Court this 18th day of April, 1951.

/s/ DAVE W. LING,

United States District Judge.

Approved as to form only, pursuant to Local Rule 22.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for the Plaintiff.

Approved by:

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By ,
Attorneys for the Plaintiff.

Defendants' Proposed Judgment:

[Endorsed]: Filed April 11, 1951.

Judgment:

[Endorsed]: Filed and docketed April 18, 1951.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now plaintiff above named and respectfully moves the Court for a new trial of the above-entitled action upon the following grounds:

1. That the Judgment is contrary to the evidence.

2. That finding of fact numbered I a is contrary to the evidence.

3. That finding of fact numbered III is contrary to the evidence.

4. That finding of fact numbered IV is contrary to the evidence.

5. That finding of fact numbered V, except the first sentence thereof, is contrary to the evidence.

6. The conclusion of law (2) is contrary to the evidence and the law.

7. That the conclusion of law (5) is contrary to the evidence and the law.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

[Endorsed]: Filed April 27, 1951.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District
Judge, Presiding.

MINUTE ENTRY OF
MONDAY, JUNE 11, 1951

Plaintiff's Motion for New Trial comes on regularly for hearing this date. Richard Fennemore, Esquire, appears for the plaintiff. Theodore McKesson, Esquire, is present for the defendant, Home Insurance Company. Said motion is submitted without argument.

It Is Ordered that said Plaintiff's Motion for New Trial be and it is denied.

Counsel for defendant now moves for order amending findings herein, and

It Is Ordered that said motion be and it is denied.

Docketed June 11, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the United States District Court, for the District of Arizona, rendered and entered April 18, 1951, and from the whole of said judgment and from the order of said District Court entered June 11, 1951, denying the plaintiff's motion for new trial.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we, our successors and assigns, are bound to pay to Eloy Gin Corporation and Home Insurance Company, and each of them, defendants above named, the sum of two hundred fifty dollars (\$250.00).

The condition of this bond is that whereas the plaintiff has appealed to the Circuit Court of Ap-

peals for the Ninth Circuit by notice of appeal filed the 9th day of July, 1951, from the judgment of this Court entered April 18, 1951, and from the order of this Court denying plaintiff's motion for new trial, entered June 11, 1951; if the plaintiff shall pay all costs adjudged against it if the appeal is dismissed, or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

EUGENE B. SMITH & CO.,
INC.,

By /s/ RICHARD FENNEMORE,
One of Its Attorneys,
Principal.

[Seal] THE FIDELITY AND CASUALTY COM-
PANY OF NEW YORK,

By /s/ LESTER B. CURTIS,
Attorney,
Surety.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor, It Is Ordered that the plaintiff's time to file the record on appeal

and docket the appeal herein in the United States Court of Appeals for the Ninth Circuit, be and it is extended to and including September 15, 1951.

Dated this 19th day of July, 1951.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed July 20, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

The Plaintiff above named hereby designates the following portions of the record to be certified and transmitted to the United States Court of Appeals for the Ninth Circuit, to wit:

1. All pleadings except plaintiff's complaint, filed January 12, 1948; defendants' Eloy Gin Corporation and Home Insurance Company, Joint Answer thereto, filed March 9, 1948; plaintiff's Amended Complaint, filed September 27, 1950.
2. Stipulation of facts, dated October 24, 1950.
3. Deposition of T. S. McCorkle, filed October 10, 1950.
4. All exhibits.
5. Reporter's Transcript of Evidence, filed herewith.
6. Findings of fact and conclusions of law, filed April 18, 1951.

7. Judgment.

8. Plaintiff's Motion for New Trial, filed April 27, 1951, and the order denying the motion.

9. Minute Entries of October 27, 1950, except entry showing filing of subpoena.

10. Plaintiff's Notice of Appeal, filed July 9, 1951.

11. Plaintiff's Bond on Appeal, filed July 9, 1951.

12. Statement of points upon which plaintiff intends to rely upon its appeal, filed concurrently herewith.

13. Order Extending Time, dated July 19, 1951.

14. This Designation.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE.

[Endorsed]: Filed August 8, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFF INTENDS TO RELY UPON
ITS APPEAL

The Plaintiff above named has perfected an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the United States District Court for the District of

Arizona entered in the above-matter and from the order of said District Court denying plaintiff's motion for a new trial entered therein and intends to rely upon the following points upon its appeal to wit:

I.

The judgment entered is not justified by the evidence and is contrary to law.

II.

Finding of fact No. III is contrary to the evidence.

III.

Finding of fact No. IV is contrary to the evidence.

IV.

Finding of fact No. V is contrary to the evidence.

V.

Conclusion of Law No. II is erroneous.

VI.

Conclusion of Law No. V is erroneous except that portion thereof concluding that the 39 bales of cotton were paid for by the plaintiff at a date prior to the date of the fire.

VII.

The court erred in sustaining defendants' objection to plaintiff's offer of proof as to the custom of the trade with respect to billing for insurance and storage charges (R.T. 15, 17-18).

VIII.

On the uncontradicted evidence, the court should have found that by the delivery of warehouse receipts covering the cotton in question, Defendant Eloy Gin Corporation became a warehouseman as to Eugene B. Smith and Company and by the terms of the receipt was obligated to insure the cotton and is therefore liable to plaintiff either because the insurance which it obtained did not cover the cotton or if it did cover the cotton then for its failure to take the necessary steps to collect the insurance.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed August 8, 1951.

In the District Court of the United States
In and for the District of Arizona

No. Civ-1135

EUGENE B. SMITH AND COMPANY, INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME INSURANCE COMPANY,

Defendants.

REPORTER'S TRANSCRIPT

Before: Hon. Dave W. Ling, Judge.

Appearances:

For the Plaintiff:

FENNEMORE, CRAIG, ALLEN &
BLEDSON, By
RICHARD FENNEMORE, ESQ.

For the Defendants:

EVANS, HULL, KITCHEL &
JENCKES, By
JOSEPH S. JENCKES, JR., ESQ.,
For the defendant, Eloy Gin
Corporation.

THEODORE G. McKESSON, ESQ.,
For the defendant,
Home Insurance Company.

The above entitled and numbered cause came on

duly and regularly for hearing before Hon. Dave W. Ling, Judge of the above-entitled Court, presiding without a jury, commencing at the hour of 10 o'clock a.m. on the 27th day of October, 1950, at Phoenix, Arizona.

The plaintiff, Eugene B. Smith and Company, was represented by its attorneys, Messrs. Fennemore, Craig, Allen & Bledsoe, by Richard Fennemore, Esq.

The defendant, Eloy Gin Corporation, was represented by Messrs. Evans, Hull, Kitchel & Jenckes, by Joseph S. Jenckes, Jr., Esq.

The defendant, Home Insurance Company, was represented by Theodore G. McKesson, Esq.

The following proceedings were had:

The Clerk: Civil 1135, Phoenix, Eugene B. Smith and Company, Inc., versus Eloy Gin Corporation and Home Insurance Company, Defendants, for trial.

Mr. Jenckes: If the Court please, I would like to be heard for just a few minutes on the Motion to Dismiss the Complaint which is interposed by the Eloy Gin.

Mr. McKesson: We are all ready.

The Court: That should have been heard before the case was set for trial, I imagine.

Mr. Fennemore: I would suggest to the Court, there are so many angles in this case that we might go ahead and put on a little evidence and brief the matter, if your Honor please, because there are at least a half dozen points on both sides. It is a thoroughly involved case.

The Court: That occurred to me when the Clerk brought me the file just a few minutes ago.

Mr. Jenckes: I think that is probably true, but I think, though, in 60 seconds if you will look at the complaint you will find it doesn't state a cause of action against Eloy Gin.

The Court: Perhaps you can assume that, but the Court can't. It would take me longer than 60 seconds. [2*]

Mr. McKesson: If your Honor please, since this amended complaint was filed by Eugene B. Smith and Company, I filed separate Motions and separate Answers, amended Answer to their amended complaint for and on behalf of the Eloy Gin Corporation and for and on behalf of the Home Insurance, two separate ones, and then I noticed it and then we had stipulated until the time of the trial and then I wrote the Eloy Gin Corporation and told them that there might be some diversity of interest between the Home and Eloy and now Mr. Jenckes is representing Eloy and since then I filed an amended Answer and Motions, so I understood it would be taken up at the time of the trial.

The Court: At the time you filed your Answer for both defendants, did you file a Motion to Dismiss the Complaint?

Mr. McKesson: Yes, sir.

The Court: Was that argued?

Mr. McKesson: No, it was understood by Mr. Fennemore, and the more we talked about that, that it would be all set over until the 27th. You

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

see, he filed it just a few days before the trial and then we continued it from the 2nd of October—what was it, or the 27th? [3]

Mr. Fennemore: Sometime during the month.

Mr. McKesson: And I noticed it and it was continued. I don't know if the Court's records show the continuation or not.

The Court: Why couldn't you go ahead and put in the proof that you have and submit it all at one time?

Mr. Fennemore: I would prefer to do that, your Honor. Frankly, particularly this cross-complaint matter that has come on very close to the time of trial, I think it ought to be adequately briefed before your Honor before we let the Motion be submitted, with the understanding that it be briefed afterwards.

Mr. McKesson: I have the brief of mine already on file and as far as my motions are concerned.

Mr. Jenckes: If the Court please, as far as the defendant Eloy Gin is concerned, I don't think I would have any objection to proceeding with the evidence if I know where I stand, particularly to what purported cause of action is alleged against Eloy in the complaint. Now, I think Mr. Fennemore attempts to allege a cause of action in contract against us for failure to secure insurance, and if that is the case, then I would [4] be prepared to go ahead, but if the Court takes the view, or if Mr. Fennemore is contending that he has alleged in his complaint a liability on our part as warehouse men, and there are allegations of negligence that I am going to have to meet this morning,

and that matter should be disposed of before we go ahead.

Mr. Fennemore: The complaint is not based on negligence because there is no evidence one way or the other as to whether there was negligence or not. This fire just occurred. Nobody knows just how.

Mr. Jenckes: In other words, I take it, based on Mr. Fennemore's statement, I would not at any time have the burden to show where we were negligent?

The Court: Apparently not.

Mr. Jenckes: That is all right with me if that is the situation. I just want to know where I stand, that is all.

The Court: All right, the record may show that all motions are submitted and the Court reserves ruling on them.

Mr. Jenckes: I think, should the record also show, if your Honor please, by stipulation of counsel that the complaint is predicated upon [5] a cause of action in contract and that there will be no question of negligence on the part of Eloy Gin in this case?

The Court: All right, if that is agreeable.

Mr. Fennemore: If the Court please, we have entered into a stipulation as to most of the facts in the case. At this time I offer that in evidence. There are a number of exhibits attached to the stipulation and it covers practically all of the documentary matters in the case.

(Thereupon the documents were received and marked as Plaintiff's Exhibit 1 in Evidence.)

PLAINTIFF'S EXHIBIT No. 1

In the United States District Court
for the District of Arizona
No. Civ. 1135

EUGENE B. SMITH & CO., INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME IN-
SURANCE COMPANY,

Defendants.

STIPULATION OF FACTS

Come Now the plaintiff and the defendants, by their respective attorneys, and for the convenience of Court and counsel present the following facts which are undisputed and may be taken as true:

(1) Plaintiff is a corporation organized and existing under the laws of the State of Texas and was not authorized to do business in Arizona until August 14, 1946. The defendant Eloy Gin Corporation is a corporation existing under the laws of the State of Arizona. The defendant Home Insurance Company is a corporation organized under the laws of the State of New York and authorized to do a general insurance business in the State of Arizona. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

(2) On or about the 7th day of November, 1945, the Eloy Gin Corporation as seller and Eugene B. Smith dba Eugene B. Smith & Co. as buyer en-

tered into two separate written contracts for the purchase and sale of cotton. The first contract, No. P-200, dated November 7, 1945, covered 300 bales of cotton, and the second contract, No. P-201, covered 1,000 bales of cotton. Said contracts were identical with the exception that the 1,000 bales contract covered a price of 85 points on the November market, with all other conditions the same as under Contract No. P-200. Attached hereto are the two original contracts, marked Exhibit A and Exhibit B, respectively. That, among other things, each of said written contracts provided in substance that the seller sold and the buyer bought the respective bales of cotton at a certain price on the terms set forth in said contracts, and each of said written contracts provided regarding insurance as follows:

“Insurance at sellers risk until payment completed.

“Reimbursement Sight Draft, gin-yard receipts attached, also Smith/Doxey cards, Draw on Eugene B. Smith & Co., care Valley National Bank, Phoenix.”

(3) That each of said contracts was completed in full accordance with its terms. As cotton was ginned and baled, the bales were marked and gin yard receipts issued for each bale, the gin yard receipts being issued by Eloy Gin Corporation to Eloy Gin Corporation and thereafter sight drafts were drawn on Eugene B. Smith & Co., in care of the Valley National Bank, Phoenix. The gin yard receipts were endorsed in blank by Eloy Gin Cor-

poration and attached to the sight drafts. As the drafts were paid, the gin yard receipts were delivered by the Valley National Bank, Phoenix, to Eugene B. Smith & Co. The bales of cotton remained in the possession of Eloy Gin Corporation until removed from its possession by surrender of gin yards receipts and delivery of the cotton to the one presenting the receipts. All of said cotton was paid for in accordance with the terms of said agreements and all delivered, and the gin yard receipts were surrendered with the exception of 40 gin yard receipts. Attached hereto and made a part hereof are 39 gin yard receipts, marked Exhibit C.

(4) On or about the 25th day of January, 1946, a fire occurred at the gin yard of Eloy Gin Corporation at Eloy, Arizona, and 39 of the 40 bales of cotton for which the plaintiff Eugene B. Smith & Co. had gin yard receipts and on which delivery had not been taken and on which gin yard receipts had not been surrendered, were destroyed in said fire. That each of said receipts contained the weight, date of issuance of the receipt, the name of the party to whom issued, and for whose account issued, and contained various other provisions as shown by the receipts (Exhibit C attached).

(5) That prior to January 25, 1946, as hereinabove stated, all of the 1300 bales of cotton evidenced by the receipts were paid for and the gin receipts delivered to Eugene B. Smith & Co., and Eugene B. Smith & Co. had surrendered up the receipts to Eloy Gin Corporation and removed all

of the cotton with the exception of 40 bales, for which it held receipts on January 25, 1946. In said fire 39 of said bales of cotton evidenced by the gin receipts were destroyed by fire. That on the 25th day of January, 1946, the Home Insurance Company had in full force and effect a policy of fire insurance issued to Eloy Gin Corporation, being No. 6857, dated August 1, 1945, attached hereto and marked Exhibit D.

(6) That on January 25, 1946, the date of said fire, Eugene B. Smith & Co. held a policy of marine fire insurance which was in full force and effect, being policy No. OC-58587 of the National Fire Insurance Company, copy of which is hereto annexed and marked Exhibit E.

(7) That after said fire, the National Fire Insurance Company, through the Cotton Insurance Association, paid to Eugene B. Smith and Co. the sum of four thousand eight hundred sixty-seven and 43/100 dollars (\$4,867.43) by its loan draft dated February 13, 1946, which is attached hereto marked Exhibit F, and in consideration of said payment, Eugene B. Smith & Co. executed, under date of February 18, 1946, Agreement hereto attached marked Exhibit G; that the 39 bales of cotton destroyed by fire and involved in this action, were included in the 40 bales covered by Exhibits F and G, and of the total sum of four thousand eight hundred sixty seven and 43/100 dollars (\$4,867.43), the sum of four thousand seven hun-

dred thirty six and 85/100 dollars (\$4,736.85) represents payment for said 39 bales.

Dated this 24th day of October, 1950.

FENNEMORE, CRAIG,
ALLEN & BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

/s/ THEODORE McKESSON,
Attorney for Defendant,
Home Insurance Company.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOSEPH JENCKES, JR.,
Attorneys for Defendant,
Eloy Gin Corporation.

Admitted October 27, 1950.

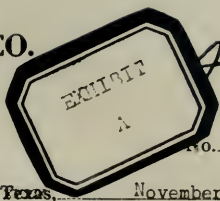
Mr. McKesson: I suggest, if your Honor please, that each one of the exhibits attached may be received and should be also introduced as Plaintiff's, whatever you want to call them, 1 or A in evidence. You see, we have a sheet here so in addition to the stipulation of facts, that these be introduced separately so we can refer to them as we go along.

The Clerk: The stipulation will be 1 and these are Number A to G. That will be Number 1-A to 1-G, inclusive.

(Thereupon the documents were received and marked as Plaintiff's Exhibits 1-A to 1-G, inclusive, in evidence.) [6]

PLAINTIFF'S EXHIBIT NO. 1-A

Eugene B Smith & Co
Eugene B Smith & Co
COTTON EXCHANGE BUILDING
DALLAS, TEXAS



CONFIRMATION

FAHRE No. 1-4
Civ-1135-64
OCT 27 1950
FLOY GINN CORPORATION
Phoenix, Arizona

Phoenix, Arizona, Texas, November 7th 1945

Floy Ginn Corporation, (Jones and Cobb crop)
Phoenix, Arizona

Dear Sir(s):

We hereby confirm having purchased from you today, through conversation with Jack Pretzer, THREE HUNDRED (300) Bales Cotton; at (see below) lbs. per lb., to be delivered by you in accordance with the rules of The Texas Cotton Association (see extract on back hereof) governing this contract, and on the following terms. (Mixed packed bales to be classed by the low side only.)

Grade Per Smith/Doxey cards, including 68 cards on hand already; unculled.

Staple " " " " " " " "

Price @ November W.F.A. prices for each quality, plus 75 points premium, f.o.b. Gin Yard at Phoenix, Arizona.

Delivery In lots of not less than 100 B/C, as fast as ginned and cards obtained.,

Terms Cal./Ariz. Texas Cotton Association Contract

Weights Original Gin Weights.

Insurance at sellers risk until payment completed.

Reimbursement Sight Draft, gin-yard receipts attached, also Smith/Doxey cards, Draw on Eugene B. Smith & Co., care Valley National Bank, Phoenix.

Differences: Good Mid Strict Low Mid. INVOICED IN DUPLICATE, Strict Good Ord.

Strict Mid. Low Mid. Good Ord.

Remarks: If possible, each delivery to be averaged, rather than a separate calculation for every grade and staple.

The Cotton covered by this confirmation is bought subject to the full compliance on the part of the seller (without expense to the buyer) with all the provisions of the United States laws and the seller hereby expressly agrees to provide the buyer with all proper licenses or certificates or any other similar requirements which identify the cotton covered hereby as free from the penalty imposed by the Agricultural Adjustment Act of 1938, and if such forms show that the cotton is subject to marketing penalty, or if the forms are not furnished before delivery of the cotton or passage of title to it, the seller expressly authorizes the buyer to deduct from the purchase price of the cotton an amount equal to the penalty imposed by such Act.

The seller hereby agrees that final settlement under this contract shall be had on outturn accounts as rendered the seller by the buyer, unless promptly on receipt of each such account, the seller applies for a revision of such account. In such event, should the parties fail to mutually agree to a revision of the account, the matter in controversy shall be arbitrated under and in accordance with the Rules of the Texas Cotton Association, relating to arbitration.

It is expressly understood and agreed by all parties to this contract, whether members of the Texas Cotton Association or non-members, that any controversy which may arise in connection with said contract shall, upon request of either party to the contract, be submitted to the Arbitration Committee of The Texas Cotton Association for adjustment in accordance with the rules of said Association governing arbitration. (Copy of these rules may be secured by applying for the same to The Texas Cotton Association, Waco, Texas.)

This evidences the entire contract between the parties hereto, and all terms, provisions and conditions relating thereto and supercedes all prior negotiations, agreements and conditions.

Failure to return this or other signed acknowledgment or prompt correction in case of error will be understood as your approval and acceptance of the sale, terms and conditions as herein stated.

We hereby confirm sale on terms and conditions stated above.
EUGENE B. SMITH & CO.
FLQY GIN CORPORATION
Per *M. Churchhill* agt.

This policy, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; PROVIDED that the mortgagee shall notify this Company of any change of ownership or increase of hazard which shall come to the knowledge of said mortgagee, and unless permitted by this policy, it shall be noted hereon; and PROVIDED further that upon failure of the insured to render proof of loss, such mortgagee, upon notice, shall render proof of loss in the form herein specified within ninety-one days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit.

Failure upon the part of the mortgagee to comply with any of the foregoing obligations shall render the insurance under this policy null and void as to the interest of the mortgagee.

This policy may be cancelled as to the interest of any mortgagee named hereon by giving such mortgagee ten days written notice.

If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage, debt and require an assignment thereof and of the mortgage.

The word "mortgagee" shall be construed to mean mortgagee or trustee.

SECTION IV

BASIC CONDITIONS

1 Concealment, This entire policy shall be void if, whether
2 fraud, before or after a loss, the insured has wil-
3 fully concealed or misrepresented any ma-
4 terial fact or circumstance concerning this insurance, or the
5 subject thereof, or the interest of the insured therein, or in
6 case of any fraud or false swearing by the insured relating
7 thereto.
8 Excepted This policy shall not cover accounts, money,
9 property, currency, securities, deeds, or evidences of
10 debt; nor, unless specifically named hereon,
11 cloth awnings, records and books of records (except for their
12 physical value in blank), bullion, animals, motor vehicles, or
13 aircraft.
14 Hazards not This Company shall not be liable for loss
15 included, by fire or other Perils insured against in
16 this policy caused, directly or indirectly,
17 by: (a) enemy attack by armed forces, including action taken
18 by military, naval, or air forces in resisting an actual or an
19 immediately impending enemy attack; (b) invasion; (c) in-
20 surrection; (d) rebellion; (e) revolution; (f) civil war; (g)
21 usurped power; (h) order of any civil authority except acts
22 of destruction at the time of and for the purpose of pre-
23 venting the spread of fire, provided that such fire did not
24 originate from any of the hazards excluded by this policy;
25 (i) neglect of the insured to use all reasonable means to save
26 and preserve the property at and after a loss, or when the
27 property is endangered by fire in neighboring premises; (j)
28 nor shall this Company be liable for loss by theft; (k) nor for
29 any electrical injury or disturbances to electrical appliances,
30 devices, or wiring resulting from artificial causes.
31 Conditions Unless otherwise provided in writing added
32 suspending or hereto, this Company shall not be liable
33 restricting for loss occurring (a, b, and c applicable
34 insurance, only to Coverage F—Fire):
35 (a) while the hazard is increased by any
36 means within the knowledge and control of the insured, pro-
37 vided such increase in hazard is not usual and incidental to the
38 occupancy as hereon described; or
39 (b) while a described building, whether intended for occupancy
40 by owner or tenant, is vacant beyond a period of thirty con-
41 secutive days; or
42 (c) as a result of explosion or riot, unless fire ensue, and in
43 that event for loss by fire only; or
44 (d) following a change in ownership of the insured prop-
45 erty; or
46 (e) while any other stipulation or condition of this policy is
47 being violated.
48 Changes or Changes in this policy may be made and
49 additions, Perils added hereon only by written en-
50 dorsement properly executed by an author-
51 ized agent of this Company and attached hereto; but no pro-
52 vision may be waived except such as by the terms of this
53 policy is subject to change.
54 Cancellation The insured may cancel this policy by notice
55 of policy, to this Company; upon surrender of
56 the policy this Company shall refund the
57 short rate unearned paid premium. This Company may cancel
58 this policy by giving the insured five days written notice; such
59 notice shall state that the pro rata unearned paid premium, if
60 not tendered, will be refunded on demand.
61 Pro rata This Company shall not be liable for a
62 liability, greater proportion of any loss than the
63 amount hereby insured shall bear to the
64 whole insurance covering the property against the Peril in-
65 volved, whether collectible or not; except if any article or
66 piece of personal property, covered hereunder by a general
67 Item (i.e., one covering several articles), is insured specifi-
68 cally (without an excess provision) under this, or any other
69 policy, then such general Item shall apply as excess over the
70 specific insurance and pay only for any actual loss sustained
71 over the amount of specific insurance.

72 Requirements in The insured shall give immediate notice to
73 case loss occurs, this Company of any loss, protect the prop-
74 erty from further damage, separate the dam-
75 aged and undamaged personal property, and furnish a com-
76 plete inventory of all property insured by this policy showing
77 in detail all costs. The insured, as often as may be reasonably
78 required, shall exhibit to any person designated by the Com-
79 pany all that remains of any property herein described, and
80 submit to examinations under oath by any person named by
81 this Company, and subscribe the same; and, as often as may
82 be reasonably required, shall produce for examination all books
83 of account, bills, invoices, and other vouchers, or certified
84 copies thereof if originals be lost, at such reasonable time and
85 place as may be designated by this Company or its representa-
86 tive, and shall permit extracts and copies thereof to be made.
87 Within ninety-one days after the loss, unless such time is
88 extended in writing, the insured shall render to this Company
89 a proof of loss signed and sworn to by the insured. Such proof
90 of loss shall reveal to the best knowledge and belief of the
91 insured the following: the time and cause of the loss; the in-
92 terest of the insured and all others in the property, including
93 any encumbrances thereon; all contracts of insurance, whether
94 valid or not, covering such property; the actual cash value of
95 each item of property and the amount of loss thereto; and by
96 whom and for what purposes the building was occupied at the
97 time of loss. No provision, stipulation, or forfeiture of this
98 policy shall be waived by any requirement, act, or proceeding
99 of this Company relating to investigation, appraisal, or ad-
100 justment of any loss.
101 Appraisal. In case the insured and this Company shall
102 fail to agree as to the actual cash value or
103 the amount of loss, then, on the written demand of either,
104 each shall select a competent and disinterested appraiser and
105 notify the other of the appraiser selected within twenty days
106 of such demand. The appraisers shall first select a competent
107 and disinterested umpire; and failing for fifteen days to agree
108 upon such umpire, then, on request of the insured or this
109 Company, such umpire shall be selected by a judge of a dis-
110 trict court of a judicial district where the loss occurred. The
111 appraisers shall then appraise the loss, stating separately
112 actual cash value and loss to each item; and, failing to agree,
113 shall submit their differences only to the umpire. An award in
114 writing, so itemized, of any two when filed with this Company,
115 shall determine the amount of actual cash value and loss. Each
116 appraiser shall be paid by the party selecting him and the
117 expenses of appraisal and umpire shall be paid by the parties
118 equally.
119 Company's It shall be optional with this Company to
120 options, take all, or any part, of the property at the
121 agreed or appraised value, and also to re-
122 pair, rebuild, or replace the property destroyed or damaged
123 with other of like kind and quality within a reasonable time,
124 on giving notice of its intention so to do within thirty days
125 after the receipt of the proof of loss herein required.
126 Abandonment. There can be no abandonment to this Com-
127 pany of any property.
128 When loss The amount of loss for which this Com-
129 payable, pany may be liable shall be payable sixty
130 days after proof of loss, as herein provided.
131 is received by this Company and ascertainment of the loss is
132 made either by agreement between the insured and this Com-
133 pany expressed in writing or by the filing with this Company
134 of an award as herein provided.
135 Suit. No suit or action on this policy for the
136 recovery of any claim shall be sustainable
137 in any court of law or equity unless all the requirements of
138 this policy shall have been complied with, and unless com-
139 menced within two years and one day next after cause of ac-
140 tion accrues.
141 Subrogation. This Company may require from the in-
142 sured an assignment of all right of recov-
143 ery against any party for loss to the extent that payment
144 therefor is made by this Company.

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached or appended hereto.

In Witness Whereof this Company has executed and attested these presents; but this policy shall not be valid unless counter-
signed by an authorized Agent of this Company.

Secretary.

President.

PLAINTIFF'S EXHIBIT No. 1-C

Original Negotiable

Bale and Receipt
Fire
No. 3713

Yard Receipt and Weight Certificate

Issued by
Eloy Gin Corporation

To Eloy Gin Corporation, c/o J. E. Tucker, the
Depositor.

Farm.....

One Bale Short Staple Cotton Stored in Open Yard
at Eloy Gin Corporation

Gross Wt. 520 Lbs.

Mark

Eloy, Ariz., 12-20, 1945

Eloy Gin Corporation Hereby Certifies:

First: That it has this day received on open storage in its gin yard, for the account of and deliverable to the depositor or order, the bale of cotton, all as above designated, named and described, subject to the Uniform Warehouse Receipt Act of Arizona and the terms and conditions of this receipt.

Second: That the correct gross weight of said bale of cotton on this day is as above shown, but is subject to and not guaranteed against shrinkage due to moisture or other natural causes; and

Third: That said bale of cotton has been insured, while stored as aforesaid under this receipt against direct loss and/or damage by fire except as

limited and provided in insurance policy covering same.

This Company will deliver said cotton in said yard to said depositor, or order, upon surrender of the original of this receipt properly endorsed and the payment of all charges against said cotton. This company is not liable for loss of or damage to said cotton by the elements, public enemy, or any other cause beyond its control, or for the grade, shrinkage in weight, defects or quality inherent in the cotton. This company claims a lien on said cotton for all its unpaid charges against the same.

Unpaid Charges:

- (1) Ginning, Bagging and Ties, Storage and Insurance for first twenty days \$. Pd.
- (2) Storage and insurance cents for each day or fraction of day after the first 20 days and;
- (3)

Insurance Paid to

ELOY GIN CORPORATION,

By /s/ **NELLIE ROGUS,**

**Authorized Agent and
Weighmaster.**

“All of the 38 other gin yard receipts in this exhibit are the same as the foregoing, except for the number, the gross weight shown, the day of month and the name of the person following the direction ‘To Eloy Gin Corp.’ ”

Admitted October 27, 1950.

No. 6857

RENEWAL OF NO.

The Home Insurance Company

NEW



YORK

NEW YORK

ORGANIZED 1853

COUNT . . . \$ 100% of Limits
 RATE 2.888 PREMIUM \$ 866.40 } TOTAL
 EXTENDED COVERAGE* RATE .068 PREMIUM \$ 20.40 } PREMIUM \$ 886.80
 Insurance attaches in connection with Extended Coverage Perils unless "Rate" and "Premium" is specified above and Extended Coverage
 isment is attached to this policy.

In Consideration of the Provisions and Stipulations herein or added hereto

OF EIGHT HUNDRED EIGHTY-SIX AND 80/100- - - - - DOLLARS PREMIUM

company, for the term of One year

the 1st day of August, 1945 at noon, Standard Time, at

the 1st day of August, 1946 location of property involved,

amount not exceeding 100% OF LIMITS - - - - - Dollars,

insure ELOY GIN CORPORATION

legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding
 amount which it would cost to repair or replace the property with material of like kind and quality within a reason-
 time after such loss, without allowance for increased cost of repair or reconstruction by reason of any ordi-
 nance or law regulating construction or repair, and without compensation for loss resulting from interruption of
 ness or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE,
 TING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT
 REINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this
 y, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for
 vation from the perils insured against in this policy, but not elsewhere.

ment of this policy shall not be valid except with the written consent of this Company.

policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated,
 are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may
 ded hereto, as provided in this policy.

FITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid
 s countersigned by the duly authorized Agent of this Company at

W. B. Reynolds
 Secretary
 1st day of August

19 45

Edward Z. Smith
 President

Agent

GUARDIAN INSURANCE AGENCY

1 Concealment, This entire policy shall be void if, whether
2 fraud, before or after a loss, the insured has wil-
3 fully concealed or misrepresented any ma-
4 terial fact or circumstance concerning this insurance or the
5 subject thereof, or the interest of the insured therein, or in case
6 of any fraud or false swearing by the insured relating thereto.
7 Uninsurable This policy shall not cover accounts, bills,
8 and currency, deeds, evidences of debt, money or
9 excepted property. securities; nor, unless specifically named
10 hereon in writing, bullion or manuscripts.
11 Perils not This Company shall not be liable for loss by
12 included. fire or other perils insured against in this
13 policy caused, directly or indirectly, by: (a)
14 enemy attack by armed forces, including action taken by mili-
15 tary, naval or air forces in resisting an actual or an immediately
16 impending enemy attack; (b) invasion; (c) insurrection; (d)
17 rebellion; (e) revolution; (f) civil war; (g) usurped power; (h)
18 order of any civil authority except acts of destruction at the time
19 of and for the purpose of preventing the spread of fire, provided
20 that such fire did not originate from any of the perils excluded
21 by this policy; (i) neglect of the insured to use all reasonable
22 means to save and preserve the property at and after a loss, or
23 when the property is endangered by fire in neighboring prem-
24 ises; (j) nor shall this Company be liable for loss by theft.
25 Other Insurance. Other insurance may be prohibited or the
26 amount of insurance may be limited by en-
27 dorsement attached hereto.
28 Conditions suspending or restricting insurance. Unless other-
29 wise provided in writing added hereto this Company shall not
30 be liable for loss occurring
31 (a) while the hazard is increased by any means within the control
32 or knowledge of the insured; or
33 (b) while a described building, whether intended for occupancy
34 by owner or tenant, is vacant or unoccupied beyond a period of
35 sixty consecutive days; or
36 (c) as a result of explosion or riot, unless fire ensue, and in
37 that event for loss by fire only.
38 Other perils Any other peril to be insured against or sub-
39 ject to. ject of insurance to be covered in this policy
40 shall be by endorsement in writing hereon or
41 added hereto.
42 Added provisions. The extent of the application of insurance
43 under this policy and of the contribution to
44 be made by this Company in case of loss, and any other pro-
45 vision or agreement not inconsistent with the provisions of this
46 policy, may be provided for in writing added hereto, but no pro-
47 vision may be waived except such as by the terms of this policy
48 is subject to change.
49 Waiver No permission affecting this insurance shall
50 provisions. exist, or waiver of any provision be valid,
51 unless granted herein or expressed in writing
52 added hereto. No provision, stipulation or forfeiture shall be
53 held to be waived by any requirement or proceeding on the part
54 of this Company relating to appraisal or to any examination
55 provided for herein.
56 Cancellation This policy shall be cancelled at any time
57 of policy. at the request of the insured, in which case
58 this Company shall, upon demand and sur-
59 render of this policy, refund the excess of paid premium above
60 the customary short rates for the expired time. This poli-
61 cy may be cancelled at any time by this Company by giving
62 to the insured a five days' written notice of cancellation with
63 or without tender of the excess of paid premium above the pro-
64 rata premium for the expired time, which excess, if not ten-
65 dered, shall be refunded on demand. Notice of cancellation shall
66 state that said excess premium (if not tendered) will be re-
67 funded on demand.
68 Mortgage If loss hereunder is made payable, in whole
69 interests and or in part, to a designated mortgagee not
70 obligations. named herein as the insured, such interest in
71 this policy may be cancelled by giving to such
72 mortgagee a ten days' written notice of can-
73 cellation.
74 If the insured fails to render proof of loss such mortgagee, upon
75 notice, shall render proof of loss in the form herein specified
76 within sixty (60) days thereafter and shall be subject to the pro-
77 visions hereof relating to appraisal and time of payment and of
78 bringing suit. If this Company shall claim that no liability ex-
79 isted as to the mortgagor or owner, it shall, to the extent of pay-
80 ment of loss to the mortgagee, be subrogated to all the mort-
81 gagee's rights of recovery, but without impairing mortgagee's
82 right to sue; or it may pay off the mortgage debt and require
83 an assignment thereof and of the mortgage. Other provisions

84 relating to the interests and obligations of such mortgagee may
85 be added hereto by agreement in writing.
86 Pro rata liability. This Company shall not be liable for a greater
87 proportion of any loss than the amount
88 hereby insured shall bear to the whole insurance covering the
89 property against the peril involved, whether collectible or not.
90 Requirements in The insured shall give immediate written
91 case loss occurs. notice to this Company of any loss, protect
92 the property from further damage, forthwith
93 separate the damaged and undamaged personal property, put
94 it in the best possible order, furnish a complete inventory
95 of the destroyed, damaged and undamaged property, showing in-
96 detail quantities, costs, actual cash value and amount of loss
97 claimed; and within sixty days after the loss, unless such time
98 is extended in writing by this Company, the insured shall render
99 to this Company a proof of loss, signed and sworn to by the
100 insured, stating the knowledge and belief of the insured as to
101 the following: the time and origin of the loss, the interest of the
102 insured and of all others in the property, the actual cash value of
103 each item thereof and the amount of loss thereto, all encum-
104 brances thereon, all other contracts of insurance, whether valid
105 or not, covering any of said property, any changes in the title,
106 use, occupation, location, possession or exposures of said prop-
107 erty since the issuing of this policy, by whom and for what
108 purpose any building herein described and the several parts
109 thereof were occupied at the time of loss and whether or not it
110 then stood on leased ground, and shall furnish a copy of all the
111 descriptions and schedules in all policies and, if required, verified
112 plans and specifications of any building, fixtures or machinery
113 destroyed or damaged. The insured, as often as may be reason-
114 ably required, shall exhibit to any person designated by this
115 Company all that remains of any property herein described, and
116 submit to examinations under oath by any person named by this
117 Company, and subscribe the same; and, as often as may be
118 reasonably required, shall produce for examination all books of
119 account, bills, invoices and other vouchers, or certified copies
120 thereof if originals be lost, at such reasonable time and place as
121 may be designated by this Company or its representative, and
122 shall permit extracts and copies thereof to be made.
123 Appraisal. In case the insured and this Company shall
124 fail to agree as to the actual cash value or
125 the amount of loss, then, on the written demand of either, each
126 shall select a competent and disinterested appraiser and notify
127 the other of the appraiser selected within twenty days of such
128 demand. The appraisers shall first select a competent and dis-
129 interested umpire; and failing for fifteen days to agree upon
130 such umpire, then, on request of the insured or this Company,
131 such umpire shall be selected by a judge of a court of record in
132 the state in which the property covered is located. The ap-
133 praisers shall then appraise the loss, stating separately actual
134 cash value and loss to each item; and, failing to agree, shall
135 submit their differences, only, to the umpire. An award in writ-
136 ing, so itemized, of any two when filed with this Company shall
137 determine the amount of actual cash value and loss. Each
138 appraiser shall be paid by the party selecting him and the ex-
139 penses of appraisal and umpire shall be paid by the parties
140 equally.
141 Company's It shall be optional with this Company to
142 options. take all, or any part, of the property at the
143 agreed or appraised value, and also to re-
144 pair, rebuild or replace the property destroyed or damaged with
145 other of like kind and quality within a reasonable time, on giv-
146 ing notice of its intention so to do within thirty days after the
147 receipt of the proof of loss herein required.
148 Abandonment. There can be no abandonment to this Com-
149 pany of any property.
150 When loss The amount of loss for which this Company
151 payable. may be liable shall be payable sixty days
152 after proof of loss, as herein provided, is
153 received by this Company and ascertainment of the loss is made
154 either by agreement between the insured and this Company ex-
155 pressed in writing or by the filing with this Company of an
156 award as herein provided.
157 Suit. No suit or action on this policy for the recovery
158 of any claim shall be sustainable in any
159 court of law or equity unless all the requirements of this policy
160 shall have been complied with, and unless commenced within
161 twelve months next after inception of the loss.
162 Subrogation. This Company may require from the insured
163 an assignment of all right of recovery against
164 any party for loss to the extent that payment therefor is made
165 by this Company.

Plaintiff's Exhibit No. 1-D—(Continued)

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated Oct. 31, 1946.

Issued to Eloy Gin Corp.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 10/31/46.

Additional Premium, \$102.72.

In consideration of an additional premium of \$102.72, it is hereby understood and agreed that loss in the amount of \$6,990.30, is hereby reinstated.

No other changes.

GUARDIAN INSURANCE AGENCY.

Agent.

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated 1/1/46.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 1/1/46.

In consideration of the deposit premium at which the above-mentioned policy is written, the limit of liability at Location No. 1 is amended as follows:

Location	Old Limit	New Limit
South of Eloy, Arizona.....	\$150,000.00	\$175,000.00

No other change.

Effective January 1, 1946.

GUARDIAN INSURANCE AGENCY.

Agent.

Plaintiff's Exhibit No. 1-D—(Continued)

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated 11/1/45.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 11/1/45.

In consideration of the deposit premium at which the above-mentioned policy is written, the limit of liability at Location No. 1 is amended as follows:

Location	Old Limit	New Limit
South of Eloy, Arizona.....	\$125,000.00	\$150,000.00
No other change.		
Effective 1, 1945.		

GUARDIAN INSURANCE AGENCY.

Agent.

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated November 1, 1945.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 11/1/45.

In consideration of the deposit premium at which the above-mentioned policy is written, the limit of liability at Location No. 1 is amended as follows:

Location	Old Limit	New Limit
South of Eloy, Arizona.....	\$100,000.00	\$125,000.00
No other change.		

Effective: November 1, 1945.

GUARDIAN INSURANCE AGENCY.

Agent.

Plaintiff's Exhibit No. 1-D—(Continued)

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated August 1, 1945.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 8/1/45.

Amount Insured, 100% of limits.

Old Rate, Fire 2.888. New Rate, Fire 2.714.

Return Premium, \$52.20.

In consideration of a return premium of \$52.20, (Fire) it is hereby understood and agreed that the fire rate as originally charged is reduced from 2.888 to 2.714 effective date of issue. In consideration of above, the deposit premium as originally charged is amended to read \$834.60.

Effective: August 1, 1945.

No other change.

GUARDIAN INSURANCE AGENCY.

Agent.

Provisional Reporting Policy Form No. 1. (Monthly Average)

This Policy Insures
Eloy Gin Corporation

Loss, if any, to be adjusted with the Insured named herein and payable to Insured.

1. On merchandise of every description (except as hereinafter excluded) consisting principally of Cotton by-products, materials and supplies manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage or repairs, but loss thereon shall be adjusted with and payable to the insured named in this policy; all while contained in any building, shed or structure, or on the premises, and in or on cars and vehicles while within 300 feet of said premises, and also while in, on or under sidewalks, platforms, alleyways and open space, provided such property be

Plaintiff's Exhibit No. 1-D—(Continued)

located within 50 feet thereof, within the limits of the State of Arizona.

2. "Provisional Amount Clause." The amount of insurance provided for hereunder is provisional and is the amount on which the deposit premium is based, it being the intent of this insurance to insure hereunder the actual cash value of the property described herein subject to the limits of liability and provisions for other insurance hereinafter provided.

3. "Limit of Liability." This policy being for the provisional amount of \$30,000.00, being 100% of the total contributing insurance, liability of this company is limited to the same percentage of any loss and in no event to exceed the same percentage of each of the following limits, but no insurance attaches under any one or more of the following limits unless a definite amount is specified as a limit and inserted in the blank immediately opposite the location item:

Item Number	Limit of Liability for all Contributing Insurance	Location, St. No. and City
1.	\$100,000.00	at South of Eloy, Arizona

[Items 2 through 9: blank.]

10. \$ 5,000.00 at any other location within the above-named geographical limits where the insured may have property as above described, subject to the conditions of the "Exclusion Clause," Paragraph No. 4, and of the "Value Reporting Clause," Paragraph No. 8.

4. "Exclusion Clause." This policy does not cover

(A) Motor vehicles, property in transit, property at or in fairs or expositions, or growing crops;

(B) At any location, which was not included in the last statement of values received by this company prior to loss, provided the insured had property as herein described at risk at such location as of the date for which such statement was made as provided in the "Value Reporting Clause," Paragraph 8.

5. "Contributing Insurance Clause." Permission is granted for other insurance written upon the same plan, terms, conditions, and provisions as those contained in the form attached to this policy, i.e., insurance written under this provisional reporting form. The insurance under this policy in accordance with its printed conditions or riders, shall contribute only with other insurance as herein above defined, against any peril insured by this policy.

6. "Specific Insurance." Insurance other than described in the "Contributing Insurance Clause," Paragraph 5, shall be known as specific insurance for which permission is hereby granted, however, in the computation of the final premium it shall not

Plaintiff's Exhibit No. 1-D—(Continued)

be permissible to deduct or credit such specific insurance against the values shown in the monthly reports except when

- (A) It has been necessary to procure such insurance to protect values in excess of the limits of liability of this policy, or
- (B) It has been disclosed by written endorsement hereon showing location, expiration and amount.

7. "Excess Clause." This policy does not attach to or become insurance against any peril upon property herein described which at the time of any loss is insured by "Specific Insurance" as defined in Paragraph 6, until the liability of such "Specific Insurance" has been exhausted, and then shall cover only such loss or damage as may exceed the amount due from such "Specific Insurance" (including the amount otherwise due from invalid insurance had same been valid, and including also the amount due from any uncollectible insurance) after application of any contribution, coinsurance, average, distribution, or other similar clauses contained in policies of such "Specific Insurance" affecting the amount due thereunder, not, however, exceeding limits as set forth herein.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 6857 of the Home Insurance Company. Agency at Phoenix, Arizona, Dated August 1, 1945.

GUARDIAN INSURANCE AGENCY.

Agent.

8. "Value Reporting Clause."

- (A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.
- (B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.

Plaintiff's Exhibit No. 1-D—(Continued)

9. "Full Reporting Clause." Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any) which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above described, less the amount of specific insurance, if any, actually in force at that location at the time of such report. Liability for loss hereunder occurring at any new location where, since filing the last report, the insured may have property as above described (except as provided in "Value Reporting Clause," Paragraph 8) shall be apportioned in a like manner, except that the proportion used shall be the relation that the values at all locations reported prior to the loss, less the amount of reported specific insurance, if any, bear to the actual cash value of the property above described at all locations, less the amount of specific insurance, if any, actually in force at the time of such report. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss.

10. "Premium Adjustment Clause." The premium named in the policy is provisional only. The actual premium consideration for the liability assumed hereunder shall be determined, at the expiration of this policy, by application of the following formula:

After deducting the amount of specific insurance, if any, (not exceeding, however, the amount of value reported) at each location, an average of the total remaining values reported at each location (but not in excess of the limit of liability established herein) shall be made, and if the premium on such average values at the rate applying at each location herein provided exceeds the provisional premium, the insured shall pay to the insurer an additional premium for such excess; and, if such premium is less than the provisional premium, the insurer shall refund to the insured any excess paid. If this policy is written for a term of more than one year, an adjustment of both the premium earned and the amount of deposit premium shall be made annually as herein provided.

11. "Retained Premium Clause." It is a further condition of this policy, anything to the contrary notwithstanding, that the final adjusted premium as provided in the "Premium Adjustment Clause," Paragraph 10, shall in no event be less than \$100.00 under this policy.

12. "Premium Payment in Case of Loss Clause." It is a condition of this policy that, in case of loss occurring hereunder, the premium applicable to the amount of loss payment shall be earned for the term of the contract; therefore, the insured shall pay this company an additional premium at pro rata of the rate applicable

Plaintiff's Exhibit No. 1-D—(Continued)

thereto for the unexpired term of this policy on the amount of the loss paid, and said premium may be deducted from the payment of said loss.

13. "Reinstatement of Loss Clause." It is a condition of this policy that, in case of loss occurring hereunder, the amount of such loss shall be automatically reinstated after its occurrence and this insurance shall then cover for the amount provided for hereunder.

14. "Verification of Values." This Company or its duly appointed representative, shall be permitted at all reasonable times during the term of this policy, or within a year after its expiration, to inspect the property covered hereunder and to examine the insured's books, records and such policies as relate to any property covered hereunder. This inspection and/or examination shall not waive or in any manner affect any of the terms or conditions of this policy.

15. This policy attaches and expires at any location at noon, meaning thereby noon standard time at such location.

16. "Subrogation Waiver." It is understood and agreed that any release from liability in a written contract entered into, prior to loss hereunder, by the insured with any person, firm, corporation or municipality, shall in no way affect this policy or the rights of the insured to recover hereunder.

17. "No Control Clause." This policy shall not be affected by failure of the insured to comply with any of the warranties or conditions endorsed hereon, in any portion of the premises over which the insured has no control.

18. "Permits." Permission granted to make alterations or repairs to the above described building(s) without limit of time and to build additions, and if in contact therewith, this policy shall cover in same under its respective items; permission granted to cease operations or shut down for not to exceed sixty (60) days at any one time, subject to the conditions of the watchman clause, if any, made a part of this policy; permission also granted to work at any and all times, and for such use of the premises as is usual and incidental in the business, as conducted therein, and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

19. "Lightning Clause." (This Clause Void as to Cyclone, Tornado or Windstorm Insurance.) This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term "lightning" and no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, that the liability of this company for any direct loss or damage by lightning shall not exceed the liability that would have been incurred hereunder if said loss or dam-

Plaintiff's Exhibit No. 1-D—(Continued)

age was caused by fire, whether or not other insurance on the property be against direct loss by lightning.

20. "Electrical Exemption Clause." If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating or distributing electricity, caused directly by electric currents therein, whether artificial or natural, including lightning.

Standard Forms Bureau Form 202 P. R. (July 1944) N.Y. 1943

Provisional Reporting Form—Extended Coverage Endorsement
(Perils of Windstorm, Hail, Explosion, Riot, Riot Attending a
Strike, Civil Commotion, Aircraft, Vehicles, Smoke,
Except as Hereinafter Provided)

Rate for extended coverage .068.

In consideration of \$20.40 Incl. provisional premium, and subject to provisions and stipulations (hereinafter referred to as "provisions") herein and in the policy to which this endorsement is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles, and Smoke.

This endorsement does not increase the amount or amounts of insurance provided in the policy to which it is attached.

If this policy covers on two or more items, the provisions of this endorsement shall apply to each item separately.

Substitution of Terms: In the application of the provisions of this policy, including riders and endorsements (but not this endorsement), to the perils covered by this Extended Coverage Endorsement, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

Fall of Building Clause: The Fall of Building Clause, if any, in the policy to which this endorsement is attached shall not apply when the fall is caused by any of the perils included in this endorsement.

Apportionment Clause: This Company shall not be liable for a greater proportion of any loss from any peril or perils included in this endorsement than the proportion this Company would assume under the provisions of the fire policy to which this endorsement is attached had the loss been caused by fire.

Glass Clause: It is expressly stipulated as applicable to all perils included in this endorsement that only such proportion of the insurance under this policy on any building covers on plate, stained,

Plaintiff's Exhibit No. 1-D—(Continued)

leaded or cathedral glass therein as the value of such glass which is damaged bears to the total value of said building.

War Risk Exclusion Clause: This Company shall not be liable for loss by any of the perils insured against in this endorsement caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power.

Waiver of Policy Provisions: A claim for loss from perils included in this endorsement shall not be barred because building is not on ground owned by the Insured in fee simple, factory operations have ceased, of change of occupancy, of existence of encumbrance, of factory operations at night, nor because of vacancy or unoccupancy.

Attached to and forming part of Policy No. 6857 of the Home Insurance Company of New York issued at its Phoenix, Arizona, Agency. Dated August 1, 1945.

GUARDIAN INSURANCE AGENCY.

Agent.

Caution: When This Endorsement Is Attached to One Fire Policy, the Insured Should Secure Like Coverage on All Fire Policies Covering the Same Property.

Provisions Referred to in and Made Part of This Form
(No. 202 P.R.)

Provisions Applicable Only to Windstorm and Hail: This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) snowstorm, tidal wave, high water or overflow, whether driven by wind or not.

This Company shall not be liable for loss to the interior of the building or the insured property therein caused, (a) by rain, snow, sand or dust, whether driven by wind or not, unless the building insured or containing the property insured shall first sustain an actual loss to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the insured property therein as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

Unless liability therefor is assumed in the form attached to this policy, or by endorsement hereon, this Company shall not be liable for damage to the following property: (a) grain, hay, straw or other crops outside of buildings or (b) windmills, windpumps, or their towers, cloth awnings, signs, metal smokestacks, temporary or board roof additions, or (c) buildings (or their contents) in

Plaintiff's Exhibit No. 1-D—(Continued)

process of construction or reconstruction unless entirely enclosed and under roof with all outside doors and windows permanently in place.

Provisions Applicable Only to Explosion: This Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels, located in the building(s) insured or in building(s) containing the property insured.

Any other explosion clause made a part of this policy is superseded by this endorsement.

Provisions Applicable Only to Riot, Riot Attending a Strike and Civil Commotion: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. This Company shall not be liable, however, for loss resulting from damage to or destruction of the described property owing to change in temperature or interruption of operations resulting from riot or strike or occupancy by striking employees or civil commotion, whether or not such loss, due to change in temperature or interruption of operations, is covered by this policy as to other perils.

Provisions Applicable Only to Loss by Aircraft and Vehicles: Loss by "aircraft" includes direct loss by objects falling therefrom. The term "vehicles," as used in this endorsement, means vehicles running on land or tracks. This Company shall not be liable, however, for loss (a) by any vehicle owned or operated by the Insured or by any tenant of the described premises; (b) to aircraft or vehicles including contents other than stocks of aircraft or vehicles in process of manufacture or for sale; (c) to fences, driveways, sidewalks or lawns.

Provisions Applicable to Smoke: The term "smoke" as used in this endorsement means only smoke due to a sudden, unusual and faulty operation of any heating or cooking unit, only when such unit is connected to a chimney by a smoke pipe, and while in or on the premises described in this policy, excluding, however, smoke from fireplaces or industrial apparatus.

Provisions Applicable Only When This Endorsement Is Attached to a Policy Covering Rents and/or Accrued Warehouse Charges: When this endorsement is attached to a policy covering rents and/or accrued warehouse charges, the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, resulting from direct loss to described property from perils insured against; and, while the business of the owner or tenant(s) of the described building(s) is interrupted by a strike at the described location, this Company shall not be liable for any loss owing to interference by any person(s) with rebuilding, repairing or replacing the property damaged or destroyed or with the resumption or continuation of business.

Plaintiff's Exhibit No. 1-D—(Continued)

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated Oct. 22, 1945.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 8/1/45.

It is hereby understood and agreed that vacancy permit under Paragraph 18 "Permits" is amended to read as follows:

To be and remain vacant and/or unoccupied and to shut down and/or cease operations for a period not to exceed ten (10) months at any one time"

instead of as written.

Effective: August 1, 1945.

No other change.

GUARDIAN INSURANCE AGENCY.

Agent.

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated Oct. 22, 1945.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 100% of Limits.

In consideration of the rate and premium at which this policy is written, it is understood and agreed that Item (A) of Paragraph 8 "Value Reporting Clause" is amended to read as follows:

"It is understood and agreed that the value of such property to be reported monthly shall be the weekly average value of such property for the preceding month based upon the value of each Saturday of such month in each location"

instead of as originally written.

Effective August 1, 1945.

No other change.

GUARDIAN INSURANCE AGENCY.

Agent.

Plaintiff's Exhibit No. 1-D—(Continued)

Copy

Form 300

11½M—7-44

Buyers Transit Form

Coverage:

1. This insurance is continuous until cancelled as provided herein and covers, except as otherwise provided in this policy, the risks of loss or damage to all cotton in bales of United States and Mexican growth while in the United States and in Canada and while owned by the Assured or while legally at the risk of the Assured under contract of purchase or sale, and not otherwise, by fire, lightning, tidal waves, overflowing rivers, collision, derailment, explosion, overturning of motor trucks, trailers or drays, collapse of highway bridges, collapse or subsidence of steamship wharves; also influx of rising water occasioned by torrential rains (excluding all cotton stored in the open).

2. It is agreed that the amount of this insurance at any one location shall not exceed the actual cash value of the cotton covered hereunder at such location as defined in Section 3 below, or in any endorsement in lieu thereof that may be attached hereto.

3. (a) The actual cash value provided for in this policy shall be (except as provided for in paragraph (c) of this section) the market value at the place of loss, which shall be determined by using, (1) the opening quotation of the first "futures" market for the next active trading month following

Plaintiff's Exhibit No. 1-D—(Continued)

the time the loss or damage commences and, (2) the prevailing "basis" as of the date the loss commences. (*All words and terms in the preceding sentence are to be taken in the sense they are understood and used in the cotton trade.*) It is specifically provided, however, that if for ten (10) consecutive days from the date loss or damage commences the "futures" market be closed, then the value shall be the actual market value of the cotton at the time and place of loss.

(b) It is understood and agreed, however, that this Company shall always have the right, in lieu of cash payment, to replace any cotton with other cotton equivalent in value and as nearly as practicable of the same grade and staple.

(c) If a specific valuation has been declared to this Company by mail or telegraphic notice prior to loss, as to cotton which has been sold or is under contract of sale and moving by land carrier to consignee, the value shall be such declared value. If certificates, as provided in Section 4, have been mailed to this Company prior to loss, the value shall be such certificated value.

4. Certificates on forms furnished by this Company may be issued by the Assured covering cotton sold or under contract of sale by the Assured but only after it has been delivered to a land carrier for transportation to purchaser or his order or for his account, provided a copy thereof shall be mailed to this Company on the day of issue. Each certifi-

Plaintiff's Exhibit No. 1-D—(Continued)

cate shall with respect to the cotton specified therein constitute the sole contract between the holder of same and this Company.

5. In respect only to cotton sold and shipped to purchasers at the risk of the Assured by all rail conveyances, for which certificates have been issued or which has been specially declared to this Company, this policy covers hazards, in addition to those specified in Section 1 above, as follows:

Loss or damage caused by cyclone, tornado, rising waters, earthquake, landslide, collapse of bridges or collapse and/or subsidence of docks, piers and/or bulkheads, landing sheds, depots, stations and/or platforms.

6. No other insurance permitted without the written consent of this Company endorsed hereon.

Payments or Advances in Case of Loss:

7. Warranted by the Assured: to give immediate notice to this Company of any loss or damage; that this Company shall have the right to investigate the circumstances attending the same, the condition of the Assured's records, the amount of loss and any other matter pertaining to the Assured's transactions in cotton, and to handle and dispose of the salvage, if any, and collect premiums due and to become due under this policy, without admitting liability and without waiving the right to deny liability on account of any breach of warranty or

Plaintiff's Exhibit No. 1-D—(Continued)

condition of this policy or any right of this Company under this policy. All claims shall be payable after the expiration of fifteen (15) days from receipt of such notice, provided satisfactory proofs have been filed.

8. After presentation of proofs of loss or damage to cotton described in Section 1 of this form (and not excluded hereunder) while in possession of any carrier or other bailee, this Company, provided the provisions of this policy have been complied with, will advance as a loan to the Assured the amount of such loss or damage, repayable only to the extent of any recovery from such carrier or bailee.

9. Payments or advances, in case of loss or damage to cotton, shall be made to banks or other persons having made advances against such cotton, as their interests may appear, or, at the option of this Company, to such banks or other persons and the Assured jointly, provided this Company receives written notice of such interest within ten (10) days after such loss or damage.

10. The Assured represents and warrants that all Federal and all other taxes and assessments on cotton covered under this policy have either been paid or this Company will be held harmless, in the event of loss or damage under this policy, as to such taxes and/or assessments.

Plaintiff's Exhibit No. 1-D—(Continued)

Reports and Premiums:

11. (a) It is warranted that on the day this policy becomes effective the Assured will report to this Company all cotton owned by the Assured and all cotton legally at the risk of the Assured as purchaser under contracts of purchase; and thereafter will report each day all daily purchases, sales and shipments of cotton, with values of such sales and shipments, including all cotton under compress or warehouse receipts, whether *insured* or not, or under bills of lading and contracts of purchase; and pay to this Company premiums thereon at rates and in accordance with the terms promulgated by this Company, which may be altered on thirty (30) days' notice to the Assured. However, this Company reserves the right, upon five (5) days' notice to the Assured, to increase rates at any location where recommendations made by this Company for the protection of cotton are not complied with.

(b) Upon issuance of this policy a minimum premium of \$50.00 shall be earned and charged against the Assured. Such minimum premium shall be payable on demand and in the event of termination of this policy, no part of such minimum premium shall be returned or credited as a return premium. The Assured shall not be liable for additional premiums under this policy until the total premiums shall exceed the minimum premium hereunder.

(c) Additional premiums for each month shall

Plaintiff's Exhibit No. 1-D—(Continued)

be payable on or before the 15th day of the succeeding month.

(d) In the event of loss the Assured shall pay the premium on the ascertained market value of cotton on which any loss may be paid, just as though such cotton had been sold.

(e) If this policy is terminated, the Assured shall pay premium on the ascertained market value of all cotton on hand, just as though such cotton had been sold.

Records:

12. Warranted by the Assured: (a) that he will make and at all times preserve an accurate record of all purchases, sales, bailments and shipments, showing the weight, classification and identity of each bale, its location and change of location, and the dates of all his transactions in cotton, which record shall be open at all times to the inspection of any authorized representative of this Company upon request; (b) that in the event of loss or damage hereunder, he will deliver such records to this Company, and in the event of his failure so to do for any cause, this policy shall be null and void as to such loss.

Special Provisions:

13. Unless otherwise provided by this Company in writing, this insurance does not cover the following:

Plaintiff's Exhibit No. 1-D—(Continued)

(a) Cotton while waterborne;

(b) Cotton, prior to actual delivery to the Assured, that has not been specifically identified in writing by marks and numbers in possession of the Assured or mailed to the Assured prior to loss;

(c) Cotton for which the Assured is liable as warehouseman or other bailee, or for which the Assured is liable to any person, firm or corporation. This insurance shall never inure to the benefit of any carrier, bailee or any person, firm or corporation other than the Assured, except that payments may be made as provided for in Section 9 above:

(d) Cotton for which any carrier or other bailee is liable, or cotton under bills of lading or storage receipts that give the carrier, warehouseman or other bailee the benefit of any insurance thereon, or cotton on which any carrier or other bailee has insurance which would attach if this policy had not been issued, or insurance which would, under any circumstances, inure to the benefit of the Assured hereunder.

(e) Cotton for which any carrier, bailee or other person has been or shall be released from any liability;

(f) Cotton linters and hull fibers;

(g) Cotton in course of delivery to purchaser by land carriers if delivery is stopped or delayed by order of the Assured or purchaser, unless declared to this Company for additional premium prior to known or supposed loss.

Plaintiff's Exhibit No. 1-D—(Continued)

Waivers:

14. Any waiver by this Company of any breach of any condition or warranty of this policy shall not be considered a waiver of any subsequent breach of any condition or warranty of this policy.

Cancellations:

15. This policy shall continue in force from year to year, but may be cancelled at any time at the request of the Assured. This Company reserves the right to terminate, on five (5) days' written notice to the Assured, any or all liability at any or all locations.

When cancellation, by the Assured or by this Company, becomes effective, all risk hereunder shall cease and terminate except as to cotton actually delivered to a carrier for shipment to purchasers at Assured's risk prior to time cancellation became effective.

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company of Hartford, Connecticut.

F. M. BUTT & COMPANY,
Agent.

(I) (We) hereby accept this policy and consent to all of its terms and conditions.

.....,
Assured.

Date August 1, 1944.

Plaintiff's Exhibit No. 1-D—(Continued)

See reverse side hereof for other conditions which are not effective unless specifically agreed to in writing by this Company through G. C. Ferrell, Special Manager, or his successors in office.

The following conditions are not a part of this policy unless accepted in writing by this Company through G. C. Ferrell, Special Manager, or his successors in office. Upon such acceptance any other provisions of this policy that are in conflict shall be void.

A. Fifth Market Day Loss Clause:

[Stamped]: The provisions of this clause are accepted and made a part of this policy from date of issue.

/s/ G. C. FERRELL,
Special Manager.

W.

.....,
Agent.

It is understood and agreed that paragraph (a) of Section 3, on the face hereof, is cancelled and the following is substituted therefor:

“The actual cash value provided for in this policy shall be (except as provided for in paragraph (c), of Section 3, of Form 300, attached hereto) the market value at the place of loss, which shall be determined by using, (1) the closing quotation of the “futures” market for the next active trading month on the fifth

Plaintiff's Exhibit No. 1-D—(Continued)

market day following the date on which the loss or damage commences and, (2) the prevailing "basis" as of the date the loss commences. (*All words and terms in the preceding sentence are to be taken in the sense they are understood and used in the cotton trade.*) It is specifically provided, however, if for ten (10) consecutive days from the date loss or damage commences the "futures" market be closed, then the value shall be the actual market value of the cotton at the time and place of loss."

B. Consignment Clause:

[Stamped]: The provisions of this clause are accepted and made a part of this policy from date of issue.

/s/ G. C. FERRELL,
Special Manager.

W.

.....,
Agent.

1. This policy is hereby extended to cover all cotton in bales consigned to the Assured for sale, except as hereinafter provided.

2. The liability as hereby extended shall attach only to cotton in the custody of rail carriers and/or compresses or warehouses issuing negotiable receipts, as follows:

(a) Upon issuance of bill of lading to the Assured, or order notify the Assured;

Plaintiff's Exhibit No. 1-D—(Continued)

(b) Cotton delivered direct to compress or warehouse, for which storage receipts are to be issued direct to the Assured, upon acceptance of such cotton by the compress or warehouse;

(c) Cotton for which storage receipts are issued in the name of someone other than the Assured, only upon assignment or delivery of such receipts to the Assured prior to loss;

(d) Cotton for which storage receipts are held by the owners of the cotton, when written evidence is delivered to the Assured or placed in the mail to the Assured prior to loss, granting him the power of disposing of such cotton, and only when such written evidence contains the marks and numbers of each bale.

3. This insurance does not cover any cotton on which the owner has other insurance which would attach if this insurance had not been issued, except on the value, if any, in excess of such other insurance.

4. This insurance does not cover any interest of, and shall not inure to the benefit of, any person, firm or corporation making any consignment of cotton to the Assured hereunder, nor shall any such consignor have any cause of action against this Company under this policy; but in event of a loss under this policy, any money found to be due hereunder shall be payable to Eugene B. Smith & Company only, whose receipt for such payment shall constitute a release in full of any and all

Plaintiff's Exhibit No. 1-D—(Continued)

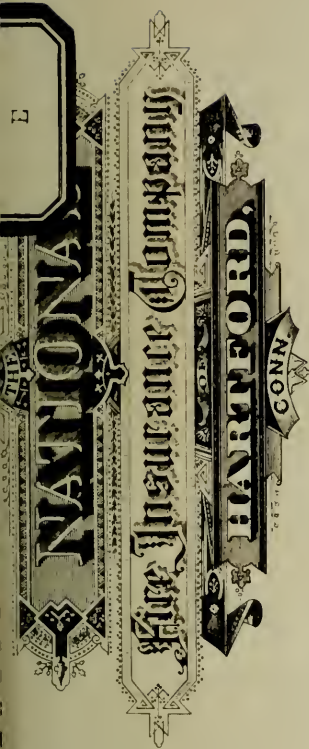
liability on the part of this Company to the Assured or any other person, firm or corporation.

5. In consideration of which the Assured agrees to keep a separate register or record of all such consigned cotton, and to report the same hereunder daily (Sundays and holidays excepted) on separate daily report blanks and to pay premium thereon at the same rates as for cotton purchased by the Assured. The Assured further agrees to include in such reports all cotton so consigned to them or to furnish this Company with written notice naming the parties, whose cotton—so consigned to the Assured—is to be excluded.

C. Theft Clause:

In consideration of additional premium at rates to be named, this insurance is extended to cover the risk of theft and/or non-delivery of an entire bale or entire bales, this extension of cover attaching from the time cotton is actually delivered into the custody of a motor truck carrier and receipt therefor given by such carrier and covering until motor carrier's contract of carriage has ceased. It is expressly understood, however, that this insurance as hereby extended does not cover any theft or non-delivery by the Assured, shipper, or consignee, or any of their employees; or nondelivery due to any action of the Civil Authorities.

Admitted October 27, 1950.



In Consideration of the stipulations and conditions herein or added hereto,
which are made a part of this policy, and of the premiums provided
DOES INSURE EUGENE B. SMITH & COMPANY
and legal representatives,

FROM AUGUST 1, 1944 TO UNTIL CANCELLED
AT NOON STANDARD TIME AT THE LOCATION OF PROPERTY
against direct loss resulting from any of the Perils (listed below) WHICH HAVE A PREMIUM INSERTED OPPOSITE THERETO
(Column 6) and only on the property described and located as provided hereon.

1 COVERAGE	2 PERILS	3 COINSURANCE APPLICABLE	4 TOTAL INSURANCE	5 TERM RATE	6 PREMIUM
F	FIRE and Lightning	AS PER FORM 300 ATTACHED.	\$ OPEN (AS PER FORM)	AS AGREED	AS AGREED TO BE PAID
E	EXTENDED COVERAGE—	Windstorm, Hurricane, Hail, Explosion, Riot, Civil Commotion, Smoke, Aircraft, and Land Vehicles.		NIL	NIL
X	EXPLOSION		\$	NIL	NIL
R	RENTS or Rental Value (Not to exceed)		\$	NIL	NIL
TOTAL PREMIUM \$ TO BE PAID					

ITEM	AMOUNT OF	DESCRIPTION OF PROPERTY	RATE
		SPECIMEN	

Plaintiff's Exhibit No. 1-E—(Continued)

300-CC

ENDORSEMENTS

Special Rider No. 4

Sales to Federal Surplus Commodities Corporation

It is hereby understood and agreed that in respect to cotton sold to the Federal Surplus Commodities Corporation, in case of loss or damage, the amount applicable under this policy from the time of sale until the date title passes to the Federal Surplus Commodities Corporation shall be either the market value that is provided in the Buyers Transit form that is a part of this policy or the invoice value at which the Federal Surplus Commodities Corporation has purchased the cotton from the Assured, whichever may be the higher.

It is warranted by the Assured that they will report all such cotton separately from all other cotton covered under this policy and pay premium thereon at rates and under conditions promulgated by this Company.

This rider may be cancelled by the Assured at any time, and by this Company on five (5) days' written or telegraphic notice to the Assured.

Attached to and forming part of Policy No. OC58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Plaintiff's Exhibit No. 1-E—(Continued)

Special Rider No. 3

Export Differential—Cotton Sales for
Export Program

1—It is understood and agreed that on shipments of cotton to foreign destinations, other than Mexico, which are eligible for the differential under the United States Government "Cotton Sales for Export Program," and which have been delivered to land carriers for shipment to final destination against a definite sale and/or freight contract and declared to this Company in accordance with Sections 3-(c) and 4 of the Buyers Transit form attached to this policy, it agreed, that in event of loss covered by the terms of this policy, and prior to:

- (a) arrival at destination in Canada; or
- (b) being laden on board ocean steamer for shipment to foreign destinations other than Canada.

2—This Company, in addition to paying the loss due under certificates or declared amounts, will pay the shipper so much of the differential as becomes uncollectible because of said loss.

3—In consideration hereof the Assured warrants that the amounts declared shall be the invoice values and charges plus 10 per cent, and the Assured further agrees to pay additional premium at the rate of one cent (1c) per One Hundred (\$100.) Dollars of such values.

Plaintiff's Exhibit No. 1-E—(Continued)

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Special Rider No. 2

This endorsement is attached to and forms part of Policy No. OC58587 of the National Fire Insurance Company, issued in the name of Eugene B. Smith & Company.

(a) It Is Hereby Understood and Agreed that on "Shippers Order" cotton insured hereunder this policy shall not be vitiated by the agreement of the Assured with the Cotton Concentration Company, Inc., Galveston, Texas, and the undermentioned carriers.

(b) In consideration of this agreement, the Assured undertake and agree to enter all such cotton on daily reports and pay premium thereon at agreed rates as of the date of delivery on the Cotton Concentration Company, Inc., Galveston, Texas, without regard to outstanding bills of lading.

(c) Limit of liability under this policy for loss by any one casualty prior to shipment to final destination and prior to cotton having passed beyond control of the Assured is limited to Open.

(d) This policy and endorsement will cover continuously until cancelled in accordance with its terms and conditions.

Plaintiff's Exhibit No. 1-E—(Continued)

It is further understood and agreed that from and after the date this policy is terminated in accordance with its terms and conditions all liability hereunder shall cease and terminate in respect to all cotton at risk of the Assured (except cotton in the hands of carriers in due course of transit to final destination) irrespective of whether or not any cotton at risk of the Assured on the effective date of termination of this insurance applies under the terms of "Shippers Order" Cotton Release signed by the Assured.

(e) In connection with the above agreement, referred to in Clause (a), loss under this policy shall be payable to Eugene B. Smith & Company, and/or one of the following carriers as their interests may appear:

Burlington-Rock Island Railroad Company
Missouri-Kansas-Texas Railroad Company of
Texas

Texas and New Orleans Railroad Company
Guy A. Thompson, Trustee, International-
Great Northern Railroad Company, Debtor.

F. M. BUTT & COMPANY,
Agent.

Special Rider No. 1

This endorsement is attached to and forms part of Policy No. OC 58587 of the National Fire Insurance Company, issued in the name of Eugene B. Smith & Company.

Plaintiff's Exhibit No. 1-E—(Continued)

(a) It Is Hereby Understood and Agreed that on "Shippers Order" cotton insured hereunder this policy shall not be vitiated by the agreement of the Assured with the North American Compress & Warehouse Co., Inc., Galveston, Texas, and the undermentioned carriers.

(b) In consideration of this agreement, the Assured undertake and agree to enter all such cotton on daily reports and pay premium thereon at agreed rates as of the date of delivery on the North American Compress & Warehouse Co., Inc., Galveston, Texas, without regard to outstanding bills of lading.

(c) Limit of liability under this policy for loss by any one casualty prior to shipment to final destination and prior to cotton having passed beyond control of the Assured is limited to Open.

(d) This policy and endorsement will cover continuously until cancelled in accordance with its terms and conditions.

It is further understood and agreed that from and after the date this policy is terminated in accordance with its terms and conditions all liability hereunder shall cease and terminate in respect to all cotton at risk of the Assured (except cotton in the hands of carriers in due course of transit to final destination) irrespective of whether or not any cotton at risk of the Assured on the effective date of termination of this insurance applies under the terms of "Shippers Order" Cotton Release signed by the Assured.

Plaintiff's Exhibit No. 1-E—(Continued)

(e) In connection with the above agreement, referred to in Clause (a), loss under this policy shall be payable to Eugene B. Smith & Company and/or one of the following carriers as their interests may appear:

Burlington-Rock Island Railroad Company,
Missouri-Kansas-Texas Railroad Company of
Texas,

Gulf, Colorado and Santa Fe Railway Com-
pany,

Texas and New Orleans Railroad Company
Guy A. Thompson, Trustee, International-
Great Northern Railroad Company, Debtor.

F. M. BUTT & COMPANY,
Agent.

Joint Account Rider

The protection granted hereunder extends to cotton, the property of the Assured and Ernst Cohn only while owned by them on joint account.

It is specifically understood and agreed that in event of loss under this policy, such loss shall be adjusted with and paid to Eugene B. Smith & Company only, whose receipt for such payment shall constitute a release in full of any and all liability on the part of this Company hereunder, subject, however, to the terms of Section 8, of Form 300, attached hereto.

Eugene B. Smith & Company covenant and agree

Plaintiff's Exhibit No. 1-E—(Continued)

to assume full responsibility for and compliance with all policy conditions as set forth in Form 300, attached hereto, including reports to this Company and the payment of premiums as provided for therein.

Attached to and forming part of Policy No. OC 58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

330-C

Additional Interest Rider No. 3

It is understood and agreed that this insurance covers for the benefit of Eugene B. Smith & Company and also for the benefit of Eugene B. Smith de Mexico, S.A., as their respective interests may appear.

It is further specifically understood and agreed that in event of loss under this policy, such loss shall be adjusted with and paid to Eugene B. Smith & Company only whose receipt for such payment shall constitute a release in full of any and all liability on the part of this Company hereunder, subject, however, to the terms of Section 9, of Form 300, attached hereto.

The original Assured hereunder, Eugene B. Smith & Company covenants and agrees to assume full responsibility for and compliance with all policy conditions, including reports to this Company and the payment of premium as provided for.

Plaintiff's Exhibit No. 1-E—(Continued)

This rider may be cancelled by the Assured at any time, and by this Company on five (5) days' written or telegraphic notice to the Assured.

Attached to and forming part of Policy No. OC 58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Additional Interest Rider No. 2

It is understood and agreed that this insurance covers for the benefit of Eugene B. Smith & Company and also for the benefit of Eugene B. Smith Industries, Inc., Dallas, Texas, and Coastal Traders, Inc., Dallas, Texas, as their respective interests may appear.

It is further specifically understood and agreed that in event of loss under this policy, such loss shall be adjusted with and paid to Eugene B. Smith & Company; Eugene B. Smith Industries, Inc., Dallas, Texas, and/or Coastal Traders, Inc., Dallas, Texas, as their respective interests may appear, whose receipt for such payment shall constitute a release in full of any and all liability on the part of this Company hereunder, subject, however, to the terms of Section 9, of Form 300 attached hereto.

The original Assured hereunder, Eugene B. Smith & Company, covenants and agrees to assume full responsibility for the compliance with all policy conditions, including reports to this Company and the payment of premiums as provided for.

Plaintiff's Exhibit No. 1-E—(Continued)

This rider may be cancelled by the Assured at any time, and by this Company on five (5) days' written or telegraphic notice to the Assured.

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company.

The above has been carefully read and its conditions are assented to.

.....,

Assured.

F. M. BUTT & COMPANY,
Agent.

330-C

Additional Interest Rider No. 1

It is understood and agreed that this insurance covers for the benefit of Eugene B. Smith & Company and also for the benefit of Galveston Pickery, Inc., Galveston, Texas, as their respective interests may appear.

It is further specifically understood and agreed that in event of loss under this policy, such loss shall be adjusted with and paid to Eugene B. Smith & Company only whose receipt for such payment shall constitute a release in full of any and all liability on the part of this Company hereunder, subject, however, to the terms of Section 9, of Form 300, attached hereto.

The original Assured hereunder, Eugene B. Smith & Company covenants and agrees to assume full responsibility for and compliance with all

Plaintiff's Exhibit No. 1-E—(Continued)

policy conditions, including reports to this Company and the payment of premium as provided for.

This rider may be cancelled by the Assured at any time, and by this Company on five (5) days' written or telegraphic notice to the Assured.

Attached to and forming part of Policy No. OC 58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Form No. 300—SRCC—VSMM—Conc.

In consideration of additional premium as agreed this policy is extended, subject to its terms and conditions, to cover all cotton in compresses, warehouses or other concentration premises, including cotton in transit to original point of concentration in the United States or Canada, as follows:

(a) Damage, theft, pilferage, breakage or destruction of cotton in bales, directly caused by strikers, locked-out workmen, or persons taking part in labor disturbances or riots or civil commotions and destruction of or damage to such cotton directly caused by persons acting maliciously; also, by vandalism, sabotage and malicious mischief, including such losses directly caused by acts committed by an agent of any government, party or faction engaged in war, hostilities or other war-like operations, provided such agent is acting secretly and not in connection with any operation

Plaintiff's Exhibit No. 1-E—(Continued)

of military or naval armed forces in the country where the described cotton in bales is situated. Nothing in the foregoing shall be construed to include or cover any loss, damage or expense caused by or resulting from, (1) delay, deterioration or loss of market, or (2) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; invasion; insurrection; rebellion; revolution; civil war; usurped power; excepting only the acts of certain agents expressly covered above.

(b) This coverage shall remain in force until cancellation of this policy, in accordance with its terms, except that it may be cancelled by either party as of August 1st, noon, of any year, provided notice of such cancellation is given or mailed to the other party prior to such date and time.

(c) The rates agreed to at the time this coverage is issued shall remain effective during its currency, unless altered upon ninety (90) days' written or telegraphic notice by this Company.

Policy in all other respects remains unchanged.

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Plaintiff's Exhibit No. 1-E—(Continued)

300 FF—SRCC—VSMM—Tr.

In consideration of additional premium as agreed, this policy is extended, subject to all its terms and conditions, to cover cotton while in transit in the United States or Canada (excluding localling-in risk) as follows:

(a) Damage, theft, pilferage, breakage or destruction of cotton in bales, directly caused by strikers, locked-out workmen, or persons taking part in labor disturbances or riots or civil commotions and destruction of or damage to such cotton directly caused by persons acting maliciously; also, by vandalism, sabotage and malicious mischief, including such losses directly caused by acts committed by an agent of any government, party or faction engaged in war, hostilities or other warlike operations, provided such agent is acting secretly and not in connection with any operation of military or naval armed forces in the country where the described cotton in bales is situated. Nothing in the foregoing shall be construed to include or cover any loss, damage or expense caused by or resulting from (1) delay, deterioration or loss of market, or (2) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; invasion; insurrection; rebellion; revolution; civil war; usurped power; excepting only the acts of certain agents expressly covered above.

(b) This extension of coverage may be cancelled

Plaintiff's Exhibit No. 1-E—(Continued)

by the Assured at any time, and by this Company on thirty (30) days' written or telegraphic notice to the Assured, but such cancellation shall not affect the coverage on cotton already in transit Provided However (except for cotton already in transit) this Company hereby expressly reserves the right to cancel this entire contract in accordance with Clause numbered 15 of the Buyers Transit Form of which this endorsement is an extension.

(c) The rates agreed to, applicable to the hazards assumed by this coverage at the time of its issuance, shall remain effective during its currency, unless altered by this Company on forty-eight (48) hours' written or telegraphic notice to the Assured.

Policy in all other respects remains unchanged.

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

ALLE 1

Clause 2 A contract of this Association is made between the buyer and seller on, and it would not be incumbent on either the seller and/or the buyer to receive and/or tender cotton from, or to make other arrangements for the sale of uncalled transactions should it be incumbent on either party to fix the price with any other person unless a sequence to such should have been duly approved in writing.

Clause 1—On purchase contracts containing a specified date of delivery, seller must give the buyer sufficient notice of time and place of contemplated delivery to enable the buyer to take physical delivery of the cotton, the same being considered, and in no event notice of less than 48 hours before contract date of delivery.

Clause 1.—Each lot of cotton must average in weight 500 pounds per bale, a variation of 5 per cent being allowed. Should the total weight of the number of bales contracted for exceed the allowance of 5 per cent or less, the buyer shall be entitled to the difference in the market on such excess weight or short weight of cotton. Should the difference be to the difference between the contract price and the market value of the cotton on the day of delivery.

Section 3.—When Yard Weights are specified in a contract and unless otherwise agreed, correct weights shall always be understood as guaranteed by the seller, and the buyer shall have the option of either accepting the yard weights, provided the cotton has not been removed from said yard, or re-weighing the cotton. In the event of such reweighings being unsatisfactory to the seller, it shall be his privilege to engage, at his own expense, a disinterested weigher, acceptable to the buyer, to weigh and determine the weight on which the contract is based.

Section 5—It is expressly understood that the buyer shall have the option of receiving his purchases on the freight of a recognized public warehouse who is not in the employ of any commission or other private agency making delivery of cotton at all ports.

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“Landed” as used in this rule shall mean that the cotton must be delivered free of freight and all charges at the compress or warehouse at the port designated by the buyer at the time of sale. It is understood that the cotton must be landed at the port of destination, and that the carrier is responsible for any detention penalties and increases due to the application of higher rates by the carrier, as well as any detention penalties and increases at the port caused by delay or negligence on the part of the consignee or the stevedores. Furthermore, any damage to the cotton caused by the carrier or the stevedores shall be the responsibility of the carrier.

RULE 8

Clause 2—"Shipment" shall mean that the cotton be placed under bill of lading.

any delay or shipment shall be understood, and "prompt" shall mean within ten days (from date of contract, Sundays and holidays not excepted).

three days from date of contract. Sundays and Holidays excepted.

It shall be a violation of the rules of the Association for any member to make a practice of paying for collect telephone calls from office to employees except under specified conditions.

FILE 10

lights, without waiting to attach a signed compass weight sheet or post weight sheet to the chart, he may do

1919. 1. 17

Unless otherwise agreed, all cotton as far as possible shall be received at the bale on fresh samples. If, however, cotton is bought or received on samples furnished by the seller it shall be the duty of the buyer to

the port warehouse, at the buyer's expense, before authorizing the seller to draw or before paying for the shipment. Any differences on "off" basis between the buyer's customs and the seller's customs shall be

Buyer has examined the redrawn samples, but in that case a margin of three percent must be deducted from invoice. This rule shall not apply to purchases from original producers, which must be stated in invoice.

ACTE 16

... shall be deducted from the invoice.

Unless otherwise agreed, the Buyer shall render final settlement on all shipments on which margins have

reference in excess of margins deducted.

The margins provided for in Rules Nn, 16, No. 17 and No. 18 to cover weight or quality differences, shall

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Plaintiff's Exhibit No. 1-E—(Continued)

I, C. L. Williams, doing business as F. M. Butt & Company, do hereby certify that I was doing business as F. M. Butt & Company on August 1, 1944, and as agent for the National Fire Insurance Company I issued National Fire Insurance Company policy No. OC 58587 on the 1st day of August, 1944, to Eugene B. Smith & Company.

I further certify that the attached policy, marked Exhibit "A," is a true and correct copy of National Fire Insurance Company policy No. OC-58587 issued by me, doing business as F. M. Butt & Company, on the 1st day of August, 1944, to Eugene B. Smith & Company.

/s/ C. H. WILLIAMS.

Subscribed and sworn to before me, this the 23rd day of October, 1950.

[Seal] /s/ VERE WADLINGTON,
Notary Public in and for
Dallas County, Texas.

Admitted October 27, 1950.

PLAINTIFF'S EXHIBIT 1-F

LOAN DRAFT

No. 970.

Atlanta, Ga., February 13, 1946.

The Cotton Insurance Association
of Atlanta, Ga.

At sight pay

to the order of

Eugene B. Smith & Company.....\$4867.43

Four Thousand Eight Hundred Sixty-seven and
43/100Dollars

which sum is advanced as a loan repayable only to the extent of any net collection we may make from any carrier, bailee or others on account of loss to 40 bales of cotton due to fire at Eloy, Ariz., on or about Jan. 25, 1946, or from any insurance effected by any carrier, bailee or others on said property, and as security for such repayment we hereby pledge to National Fire Ins. Co. the said claim and to deliver to them fully endorsed the bills of Lading and/or storage receipts for said property, and we agree to enter and prosecute suit against said Railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Nat'l Fire Ins. Co.

To
The Cotton Insurance Association
Through
The Citizens & Southern National Bank
Atlanta, Ga.

Claim No. 2280.

/s/ S. E. MOTLE,
Loss Supervisor.

(Loan Receipt attached in duplicate.)

[Stamped]: Paid Feb. 21, 1946, check No. 79149.

[Stamped]: Paid Feb. 21, 1946, collection statement, The Citizens & Southern National Bank.

[Stamped]: Commodity Department, Feb. 18, 1946, No. 45.

[Back of Draft.]

Notice

All Parties to Whom This Draft Is Payable
Must Endorse in Ink

Received from the: National Fire Ins. Co. the
Amount as Stated Herein, Subject to the Conditions Named in Face of Draft.

[Stamped]: Pay to the Order of Republic National Bank, Dallas, Texas, Previous Endorsements Guaranteed.

EUGENE B. SMITH & CO.

PLAINTIFF'S EXHIBIT No. 1-G

Received from National Fire Insurance Co. the sum of Four Thousand Eight Hundred Sixty-Seven and 43/100 Dollars as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee, or others, on account of loss or damage to cotton in bales, our property, due to fire at Eloy, Ariz., on or about the 25th day of January, 1946, or from any insurance effected by any carrier, or bailee, or others, on said property and as security for such repayment we hereby pledge to National Fire Ins. Co. the said recovery and deliver to them the bills of lading and/or warehouse or storage receipts for such property, and we agree to enter and prosecute suit against said railroad, carrier, bailee, or others, on said claim with all due diligence at the expense and under the exclusive direction and control of the said National Fire Ins. Co.

In Consideration of the said loan to us as aforesaid, we hereby represent and warrant unto the said National Fire Ins. Co. that we have not directly, or indirectly, released or discharged Eloy Gin Corporation or any person, firm or corporation from any liability or cause of action on account of said fire, or of the loss caused thereby, or in connection therewith.

Dated this 18th day of February, 1946, at Dallas, Texas.

EUGENE B. SMITH & CO.

By /s/ S. D. CONWAY.

Standard Form for Presentation of Insured Warehouse Receipt

Cotton Fire Claims

To: Eloy Gin Corporation, Warehouse Company
Eloy, Arizona.

(Location of Loss) Eloy, Arizona. (Date of Loss) Jan. 25, 1946.

(Name of person presenting claim) Eugene B. Smith & Company.

(Address of claimant) 1419 Cotton Exchange Bldg., Dallas 1, Tex.

Detailed Statement Showing How Amount of Claim
Is Determined

(If space below not sufficient, attach list)

Bale No.	Grade	Staple	Weight	Price	Amount
3736	Middling	1"	485		
3509	Middling	1"	518		
3510	Middling	1"	582		
3513	Middling	1"	478		
3514	Middling	1"	549		
3685	Middling	1"	525		
3734	Middling	1"	415		
				<hr/>	
				7 B/C.....3,552# @ 25.16	\$893.68
3413	St. Mid. Spt.	1 1/32"	470		
3411	St. Mid. Spt.	1 1/32"	570		
				<hr/>	
				2 B/C.....1,040# @ 25.51	\$265.30
3423	Middling	1 1/32"	515		
3516	Middling	1 1/32"	545		
3686	Middling	1 1/32"	480		
3687	Middling	1 1/32"	527		
3688	Middling	1 1/32"	564		
3711	Middling	1 1/32"	550		
3735	Middling	1 1/32"	535		
3754	Middling	1 1/32"	630		
3759	Middling	1 1/32"	515		
3761	Middling	1 1/32"	541		
3762	Middling	1 1/32"	515		
3763	Middling	1 1/32"	540		
				<hr/>	
				12 B/C.....6,457# @ 25.51	\$1,647.18
3515	St. Low Mid.	1"	520		
3712	St. Low Mid.	1"	560		
3713	St. Low Mid.	1"	520		
				<hr/>	
				3 B/C.....1,600# @ 24.01	\$384.16

Bale No.	Grade	Staple	Weight	Price	Amount
3737	Low Middling	1"	445		
3738	Low Middling	1"	500		
3520	Low Middling	1"	503		
3521	Low Middling	1"	531		
3594	Low Middling	1"	662		
3595	Low Middling	1"	478		
				<hr/>	
6 B/C.....				3,119# @ 20.76	\$647.50
3684	Low Middling	1 1/32"	535		
3592	Low Middling	1 1/32"	422		
				<hr/>	
2 B/C.....				957# @ 21.01	\$201.07
3744	St. Good Ord.	1"	488		
3745	St. Good Ord.	1"	570		
3748	St. Good Ord.	1"	480		
3593	St. Good Ord.	1"	446		
3596	St. Good Ord.	1"	544		
3746	St. Good Ord.	1"	605		
3747	St. Good Ord.	1"	558		
				<hr/>	
7 B/C.....				3,691# @ 18.91	\$697.96
7 B/C—Middling 1"				\$ 893.68	
2 B/C—St. Mid. Spts. 1 1/32"				265.30	
12 B/C—Middling 1 1/32"				1,647.18	
3 B/C—St. Low Middling 1"				384.16	
6 B/C—Low Middling 1"				647.50	
2 B/C—Low Middling 1 1/32"				201.07	
7 B/C—St. Good Ord. 1"				697.96	
				<hr/>	
Total 39 B/C				\$4,736.85	

In addition to the information given above, the following information and documents are submitted in support of this claim:

- (x) 1. Warehouse receipts representing cotton lost or damaged.
- () 2. Acceptable certification as to grade and staple, preferably by Government licensed classer.
- () 3. State whether this cotton is insured by you against loss or damage by fire. If so, give the name of Company and amount of insurance.....

You are hereby authorized for the undersigned's account to adjust any claim against the Insurance Company carrying insur-

ance through you, protecting the undersigned's interest in said cotton as the holder of such insured receipt, and to collect any sum that may be due the undersigned as the result of damage to such cotton, and to fully release said Insurance Company.

EUGENE B. SMITH & CO., INC.

By /s/ S. C. PIORSO.

Admitted October 27, 1950.

Mr. Fennemore: That will be fine. They will be easier to refer to when they are marked on the stipulation. Mr. Churchill, will you be sworn.

CHARLES NOBLE CHURCHILL, JR.

was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Direct Examination

By Mr. Fennemore:

Q. Will you state your name, please?

A. Charles Noble Churchill, Jr.

Q. By whom are you employed, Mr. Churchill?

A. Eugene B. Smith and Company, Inc.

Q. In what capacity are you so employed?

A. I am their agent for Arizona.

Q. Arizona agent, and what are your duties as Arizona agent?

A. Buying and shipping and paying for cotton.

Q. For the account of Eugene B. Smith?

A. For the account of Eugene B. Smith and Company exclusively.

Q. How long have you been employed by Eugene B. Smith and Company?

(Testimony of Charles Noble Churchill, Jr.)

A. Since April 1st, 1942. [7]

Q. Now, at that time was Eugene B. Smith and Company a corporation? A. No.

Q. It was just——

A. (Interrupting): Just a company, sole owner as far as I know, by Mr. and Mrs. Eugene B. Smith.

Q. And subsequently it became a corporation and you went right ahead on working for the corporation, is that correct? A. That is correct.

Q. How long have you been engaged in the cotton business? A. Since 1914, September.

Q. That is a period of some 35 odd years?

A. With the exception of three years that I was in the service during the First World War.

Q. And as a result of your experience in the cotton business, are you thoroughly familiar with the customs of the trade?

A. I believe that I am.

Q. Now, in connection with the cotton involved in this action, was this cotton purchased through your office in '45?

A. The cotton that was involved in the fire?

Q. In the fire.

A. It was purchased as a part of a contract [8] for later delivery.

Q. If you will refer to Exhibit A and Exhibit B, that will be Exhibit 1-A and Exhibit 1-B, are those copies of contracts which included this cotton that was destroyed in the fire?

(Testimony of Charles Noble Churchill, Jr.)

A. I believe they are exact copies, yes, sir.

Q. Now, what is the method of buying cotton in general, Mr. Churchill? Do you send in a written order first or how do you order it?

Mr. McKesson: I object, your Honor, as to what the custom is, what he did in this case.

Mr. Fennemore: In this particular case, if you remember? Do you remember how you bought this cotton to begin with?

A. The cotton was offered to us in a thousand bale contract to be delivered when ginned, and, of course, when the bale receipts were issued and invoiced to us——

Q. (Interrupting): Well, all I am getting at, Mr. Churchill, is when these particular agreements were executed. Were they executed after you already told them you would buy the cotton?

A. The contract was, yes. We sent it to them for signature and then put our signature on it at the same time. They kept one copy and sent two copies back to us. [9]

Q. Then as the cotton was ginned, what was the next step in the procedure?

A. The cotton is invoiced after the Government class cards are received showing the grade and staple on each bale so as to determine the market difference, what we call the different premium and discount on each grade and staple.

Q. Now, if you will refer to Exhibit 1-C, which consists of 39 yard receipts and weight certificates covering this particular cotton, when were those

(Testimony of Charles Noble Churchill, Jr.)

particular documents prepared with reference to the general procedure of getting this cotton to you?

Mr. McKesson: I think the record speaks for itself, your Honor please, it shows on its face. It has been entered in evidence.

The Court: He might not——

Mr. Fennemore (Interrupting): I am simply trying to get the procedure that is followed.

The Witness: I didn't quite get that.

Mr. Fennemore: I mean, when are these issued with reference to the procedure in getting the cotton baled and inspected by the Government and into your hands?

A. These were issued on the date shown on each gin receipt. That was December 12th, 1945, [10] to December 13th on the first three bales and then a consecutive—various dates on them. It shows the dates as late as December 20th, 1945.

Q. And were those issued after the cotton was baled and inspected?

A. I would not say "inspected." The usual procedure is to issue this gin receipt as soon as the bale of cotton is, you might say, manufactured or put together. They bring in a list of the bales from the press docks, tag the gin, the usual procedure, and in the office the gin clerk takes that list and copies down a tag number on a corresponding gin tag receipt, tag number, and fills in the weight and enters the date that that bale was so ginned.

Q. I see. Then after these are prepared, these particular ones are, as we have stipulated, were

(Testimony of Charles Noble Churchill, Jr.)

sent to the Valley Bank with the draft attached, is that correct? A. That is right.

Q. Now, was payment for them made at the Valley Bank on presentation, or was it necessary to send them to Dallas?

A. No, they are paid on presentation with draft at the Valley Bank at Phoenix.

Q. Now, each of these documents show at [11] the bottom, has a notation "Ginning, Bagging and Ties, Storage and Insurance for first 20 days," marked "paid." For whom are they paid and how?

Mr. McKesson: I object to that, they speak for themselves.

The Court: Well, I know, but you are familiar with this case. I don't know anything about it.

Mr. McKesson: Oh, I see.

The Court: Now, what exhibit do you refer to?

Mr. Fennemore: I am referring to Exhibit 1-C, which consists of 39 gin receipts, and my question is by whom the first 20 days paid.

The Court: All right, you may answer.

A. The first 20 days insurance is normally and usually paid by the producer or the farmer, the customer of the gin.

Mr. Fennemore: That is the custom of the trade?

A. That is the custom of the trade of all gins in Arizona so far as I know.

Q. Now, what is the procedure for the payment of insurance and storage after the first 20 days, if there is a custom?

(Testimony of Charles Noble Churchill, Jr.)

Mr. Jenckes: We object to that on the [12] ground it is immaterial.

Mr. Fennemore: What is the custom?

Mr. Jenckes: I don't think that has anything to do with this case. The gin receipts say this that there wasn't any charge made for it, so what does custom have to do with it?

Mr. Fennemore: It doesn't say anything about the custom.

Mr. Jenckes: It says on this blank that there wasn't any charge.

Mr. Fennemore: It doesn't mean there wasn't any charge.

Mr. Jenckes: He can ask this witness if there was a charge, but I don't think he ought to ask about the custom and practice. If they made a charge this witness can testify to it, but why the custom and practice?

Mr. Fennemore: Because the point is, all of these contracts are made in the light of a practically universal custom which was accepted by the cotton buyers and by the gins. I simply want to show what that custom was in the light of which all of these contracts were made.

The Court: Well, if that is true, why not have it comply particularly to this transaction? There might be deviations or exceptions under some [13] circumstances.

Mr. Fennemore: That is true, but under this particular transaction, nothing was said one way or

(Testimony of Charles Noble Churchill, Jr.)

the other. They simply contracted in the light of what was the accepted custom.

Mr. McKesson: If your Honor please, that is not true and we do not stipulate and object to any evidence as to the custom. What was done in this case and what controls, because the entire transaction was not handled as an ordinary custom.

The Court: Well, all right, then, let the witness testify if he is able to as to what was done in this particular instance.

Mr. Fennemore: In this particular case, was there any specific agreement with respect to the payment of storage and insurance after the first 20 days?

Mr. McKesson: Your Honor, please, I object to that. That is a different question, and the gin receipts under 1-C speak for themselves.

Mr. Jenckes: Not only that, if there was any payment or any charge made to Smith, this witness can testify whether there was or whether there was not, if he knows.

The Court: Well, that is probably true. Was there any payment made after the 20 days? If [14] so, by whom?

Mr. Fennemore: Well, if the Court please, it is my understanding, if he doesn't know whether there was any payment or not, that there was a custom among all of these gins and all of these producers followed with respect to this insurance, and when they bought these receipts everybody assumed that that practice would be followed, that that was the

(Testimony of Charles Noble Churchill, Jr.)

universal practice with the gins in this area and to the extent that the contracts were made, everybody just assumed that that practice would be followed. Whether it was followed in this particular case, the records are in such terrible condition, nobody knows, and, of course, there is so much cotton bought and sold, not only by Eugene B. Smith, but by all of these people. The purpose of the testimony is to show what the custom was in the light of which it was assumed it would be followed by these particular contracts.

Mr. Jenekes: I think it is wholly immaterial, if your Honor please. If it could be shown what the evidence was in this case and, certainly, it can be shown if they paid for insurance in storage, they certainly know it. If they didn't pay for insurance in storage, that is another thing. I [15] think the fact is evident, and now Mr. Fennemore is trying to leave the Court with the impression that that was the ordinary custom. It may have been, but it was not true in this case, and the receipts themselves show it apparently was paid but no charge made. You see, this receipt shows it was issued by Eloy to the Eloy Gin and Eloy sold the cotton to Smith, so it is not the situation that you might have where Eloy was holding the cotton for somebody else. There wasn't any charge made because Eloy owned the cotton when it sold it to Smith, but what the custom was in other situations doesn't have a thing to do with this case. It is wholly irrelevant and immaterial.

(Testimony of Charles Noble Churchill, Jr.)

Mr. Fennemore: I might say for your Honor's benefit, what I am trying to show here is that these charges were always paid by billing subsequent to delivery. That was the universal custom, and that billing was made at any time from a few days after to sometimes a year later, but always they were billed for insurance and storage at some subsequent date.

The Court: Was that done?

Mr. Fennemore: We don't know whether it was done or not. If it was done, it was paid, and [16] if it was not done, we will pay it any time they will bill us.

Mr. Jenckes: If your Honor please, there wasn't any charge for it. Certainly, if they paid for it, it will show it.

Mr. Fennemore: I am inclined to think actually they didn't bill it because they deny liability on the cotton itself.

The Court: You can make your offer of proof. I don't believe I will let you show it, but you can make your offer for the record.

Mr. McKesson: If your Honor would take time to look at one of the receipts to see there was no charge made.

The Court: You can make your offer of proof.

Mr. Fennemore: Well, we offer to prove that the custom of the trade in the light of which these contracts were made was for insurance and storage charges after the first 20 days were billed by the respective gins to the purchaser at some later date,

(Testimony of Charles Noble Churchill, Jr.)

which varied from different gins anywhere, in some cases, a day after delivery to about as much as a good many months afterwards, and that it was understood by the Eugene B. Smith and Company, through its agent, and by Eloy, that that practice would be followed with respect to [17] these, and that had they been presented with a bill for the storage and insurance in excess of the 20 days, the bill would have been paid, but they probably do not have the records and in all probability the bill was not presented because they deny liability on the 39 bales.

The Court: All right, now you object to that?

Mr. McKesson: I object on behalf of the insurance company as irrelevant and incompetent and not binding upon the defendant, the Home Insurance Company, and also on the ground it is an attempt to prove something to the contrary about the written agreement which was introduced in evidence under 1-C in this case, showing that the gin yard receipts for 39 bales, the gin yard receipts that are in evidence was that the first 20 days storage and insurance was paid, and as to the future part, it is blank, and that the gin receipts show it was issued by the Eloy Gin Corporation to itself and then there is a blank endorsement on the back which went with the drafts to the bank and were paid.

Mr. Jenckes: The same objection for Eloy Gin.

The Court: All right, I will sustain the [18] objection.

(Testimony of Charles Noble Churchill, Jr.)

Mr. Fennemore: Mr. Churchill, I assume you have no independent recollection of whose cotton this was; I mean, the producers of the cotton were?

A. We have a record of it in our office. The cotton belonged to several farmers and was invoiced for their account, and whether they had been paid for it by Eloy Gin Corporation is something that would be a matter of the way they handled their business.

Q. You don't know whether the Eloy had paid for it prior to delivery to you or not?

A. No, I don't.

Q. None of this was Eloy produced cotton, though?

A. There were some cases where the Eloy Gin Corporation, to the best of my knowledge, farmed some land in their own name and then they farmed some in the name of various tenant partnerships or independent——

Q. (Interrupting): I understood according to your records this particular cotton was several farmers' cotton.

Mr. Jenckes: Your Honor, please, we object to this line of testimony. I think it is wholly [19] immaterial and we move to strike the testimony.

The Court: Well, that doesn't prove anything one way or the other.

Mr. Jenckes: Not that I can see. That is, we don't like to have anything in the record that we don't have the effect of.

Mr. McKesson: Your Honor, please, we object

to that. On these two contracts, one for 300 bales and one for a thousand bales, that would be a question of title to the property and it is entirely immaterial, and the Home Insurance Company also moves to strike the testimony.

The Court: It may stand.

Mr. Fennemore: I don't think it is particularly material one way or the other. It happens that these receipts show it is the Eloy Gin Corporation; for instance, one was to J. E. Tucker, I see, and Eloy handled it that way as a matter of convenience. That is all we have.

Mr. McKesson: No questions.

The Court: That seems to be all.

Mr. Fennemore: May Mr. Churchill be excused?

Mr. McKesson: Subject to call by telephone. By the way, Mr. Jenckes, yesterday, after consultation you agreed to stipulate that this [20] amended Complaint of your, you charged that \$4,736.85 to the amount that we computed for you yesterday, which is now \$4,028.61 that you changed, or——

Mr. Fennemore (Interrupting): Well, I don't think it is necessary to amend the Complaint again, simply that we agree that the value of this cotton, for the purpose of this suit, is \$4,028.61 instead of the \$4,700 odd which is named in the Complaint.

Mr. McKesson: Named in Paragraph 3.

The Court: Yes, I made the insertion.

Mr. McKesson: So stipulated.

Mr. Fennemore: And we have a deposition, your Honor. Do you want to go through——

Mr. McKesson (Interrupting): If you will give

us about five minutes on this maybe we can just save the Court's time by not reading this into the record, if your Honor please.

The Court: All right.

Mr. Fennemore: That will be all of our case when that goes in.

Mr. McKesson: These corrections aren't made on the original—that I have, on the copy. There are certain things he could not supply—memorandums on there. We have no objection to the [21] deposition, if your Honor please, to any particular questions or answers, other than the witness seemed to have with him at the time of the deposition the wrong insurance policy and he said he didn't know whether it was the right one or not, and at one time was referred to as the Royal policy, but according to our stipulation here, the Royal policy in effect at that time was introduced in evidence as Exhibit 1-E, or they have introduced the 1-E down there.

Mr. Fennemore: I think we could probably correct the record so there will be no misunderstanding by stipulating that on page 16, when the questioner—

The Court (Interrupting): What policy are you referring to, the one issued to Smith or the Eloy Gin?

Mr. McKesson: The one issued to Smith.

Mr. Fennemore: The questioner asked him the question: "Have you made any claim or accepted any payment under this Royal Insurance Company policy?" and the witness answered: "I accepted a

payment, yes, sir." That should have referred to the policy issued by the National Fire Insurance Company and the question and answer can be corrected accordingly to show the actual facts. [22]

The Court: You can correct it.

Mr. McKesson: But the real policy that Eugene B. Smith has is introduced in evidence as 1-E.

Mr. Fennemore: The record may show I have corrected the question on page 16 by writing in the word "National" and striking out the word "Royal." May the deposition be received in evidence?

The Court: Yes.

(Thereupon the document was received in evidence as Plaintiff's Exhibit Number 2.)

[Plaintiff's Exhibit No. 2, Deposition of T. S. McCorkle, set out in full at pages 116 to 144 of this printed record.]

Mr. Fennemore: Mr. Bolt.

Mr. McKesson: Are you calling him as your witness?

Mr. Fennemore: Are you going to put him on?

Mr. McKesson: I don't know.

Mr. Fennemore: I had better have him for the sake of the record, then.

GEORGE K. BOLT

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows: [23]

Direct Examination

Mr. Fennemore:

Q. Will you state your name for the record, sir?

A. George K. Bolt.

Q. By whom are you employed?

A. General Adjustment Bureau.

Mr. McKesson: Now, if your Honor please, may the record show that the plaintiff is using Mr. Bolt as their witness on direct examination and he is not an officer of the Home Insurance Company to the extent he can be called for cross-examination?

The Court: Well, they haven't made any such claim.

Mr. McKesson: Yes, but I know, I just want to point that out.

The Court: All right.

Mr. Fennemore: By whom were you employed in the early part of 1946, Mr. Bolt?

A. The General Adjustment Bureau.

Q. And what is the General Adjustment Bureau?

A. It is an organization functioning to adjust losses under insurance policies, representing insurance companies.

Q. It represents insurance companies in the [24] adjustments? A. Yes.

Q. At that time did you have occasion, that is, either in January or possibly in February of '46,

(Testimony of George K. Bolt.)

did you have occasion to adjust a loss at the Eloy Gin? A. Yes.

Q. And included in the loss that you adjusted were the 39 bales in controversy here, were they not? A. No, I am not sure.

Q. Let me change my question: Included in the bales that were burned up at that time in the fire that occurred on January 25th, there were the 39 bales involved in this action, is that not correct?

A. Well, actually, I think there were 27—37.

Q. There was 37 of these 39?

A. Yes, I think in a fire on January 25th.

Q. Now, in making that adjustment did you handle that entirely by yourself, let me ask you that? A. Yes.

Q. And did you assist the Eloy Gin representatives in making up their proofs? [25]

A. The proof was typed in our office.

Q. Did you advise the Eloy Gin representatives that you were working with that the cotton involved in this action was not covered by insurance?

Mr. McKesson: I object to that as immaterial as far as this case is concerned.

The Court: He may answer.

A. I advised them that in my opinion that it was not covered.

Mr. Fennemore: And you had arrived at that opinion, had you, by reason of an opinion given you by one of the counsel for the insurance companies? A. No.

Q. Did you ask for any such opinion?

(Testimony of George K. Bolt.)

A. Yes.

Mr. McKesson: I object as immaterial.

The Court: He may answer.

Mr. Fennemore: You asked for a legal opinion?

A. Yes.

Q. And whom did you ask for that opinion?

A. Mr. McKesson.

Q. Did he give you the opinion? A. Yes.

Q. And then you transmitted that information to Eloy? [26] A. To the insurance company.

Q. Well, didn't you advise Eloy that this cotton should not be included in the Proof of Loss?

A. Yes, I advised them that in my opinion the cotton was not a proper item.

Q. They followed your opinion, is that correct?

Mr. McKesson: Your Honor, please, this is cross-examination. I object to that as immaterial. On direct examination you might go into a lot of issues, but he is his own witness. He certainly can't cross-examine his own witness.

The Court: I don't believe he has.

Mr. Fennemore: I just want to get at the facts.

The Witness: Your question?

Mr. Fennemore: What was the last question—that is, they did not include the cotton involved here in the Proof of Loss then? A. No.

Mr. Fennemore: That is all.

(The witness was excused.)

Mr. Fennemore: Now, to save calling opposing counsel as a witness, may it be stipulated that the

Home Insurance Company, from the time of [27] filing of this action until the date of the filing of the separate Answers of a recent date which the Clerk's record will show, conducted the defense of this action both on its own behalf and on behalf of the Eloy Gin Corporation. May that be stipulated?

Mr. McKesson: Why, I won't stipulate to any such thing as that. The record speaks for itself. If that is what it shows, then, that is what it is.

Mr. Fennemore: Well, as I say, I was going to save Mr. McKesson the necessity of becoming a witness for me.

The Court: Well, he won't stipulate, so that settles that.

Mr. McKesson: The record shows.

Mr. Fennemore: What does the record show?

Mr. McKesson: I don't know, you got the record there. I object to that anyway as immaterial, has nothing to do with the trial of this case.

Mr. Fennemore: It bears on two points on waiver, your Honor.

Mr. McKesson: Certainly, there is no evidence of that in here and there is no pleadings here and no evidence could be received pertaining to a [28] waiver on anybody's part.

Mr. Fennemore: No necessity for pleadings on the thing. The matter appears in the Answer, not in the complaint, and claim is made, first, that the action should have been filed within one year and, secondly, there was no Proof of Loss filed. This goes, first, to the question as to whether the insurance company at this late date can still insist on

either of these points when it has, first of all, participated in preparing Proofs of Loss and, secondly, they conducted this litigation for almost four years without ever raising those questions.

The Court: All right.

Mr. Fennemore: I will have to ask you to be sworn, Mr. McKesson.

Mr. McKesson: What is it you want?

Mr. Fennemore: Well, I simply want either a statement that the Home Insurance Company conducted this litigation up until the date when the separate Answers were filed both for its own account and for the account of the Eloy Gin Corporation.

Mr. McKesson: I still say the record speaks for itself, your Honor, please.

Mr. Fennemore: I take it you are not [29] willing to so stipulate?

Mr. McKesson: No.

Mr. Fennemore: I will have to ask you to be sworn.

Mr. McKesson: Will you call me as your witness now?

Mr. Fennemore: Yes, I will take that chance.

Mr. McKesson: I want my witness fee.

THEODORE G. McKESSON

was called as a witness by the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Fennemore:

Q. Your name is Theodore McKesson?

A. Yes, sir.

Q. And you are one of the attorneys of record in this matter? A. Yes, sir.

Q. Will you state the circumstances under which you were employed to defend this action?

A. Can I object to the question, your Honor, please? That is a matter of relationship between attorney and client. [30]

Mr. Fennemore: Let me ask you this question and you can give me your conclusions, Mr. McKesson: Were you employed by the Home Insurance Company to defend this action when it was originally filed?

A. It came to my office to be answered.

Q. And who employed you for that purpose?

A. Well, I don't know. I presume they were both sued at the same time and both complaints came in and nothing was said about it.

Q. Who brought the complaints to you?

A. I don't know whether they came by mail or somebody handed them to me. I don't know.

Q. And to whom did you look for your compensation in the matter?

A. Well, may I object to the question, if your

(Testimony of Theodore G. McKesson.)

Honor please? That is immaterial who is going to pay me as far as this lawsuit is concerned. If the Court wants me to answer that I will answer.

The Court: Well, you represented both parties?

A. I did.

The Court: That should cover it.

The Witness: I answered for both of them, and in order to shorten your story here, this [31] case was set for trial on two or three occasions and then finally Mr. Fennemore thought that he would have to amend and I stipulated that he amend and at the same time he stipulated, which is in the record, that I might file any defense I may see fit to his amended complaint, which I did, and I filed separate motions to dismiss, and Answers on behalf of the Eloy Gin Corporation, and separate motions to dismiss and separate Answer for the Home Insurance Company to the amended complaint, and then I advised the Eloy Gin Corporation and their attorneys, Mr. Jenckes and other people interested in the Eloy Gin Corporation that there might arise the question of difference of rights between the Home Insurance Company and the Eloy Gin Corporation in the event that the plaintiff might be able to prevail——

Mr. Fennemore (Interrupting): Just a minute, Mr. McKesson, that is not responsive to any question I asked.

The Witness: So the Eloy Gin Corporation employed separate counsel and Mr. Joe Jenckes was here representing them on Monday of this week,

(Testimony of Theodore G. McKesson.)

and he filed an amended Answer, a Motion to Dismiss, and so forth, to your amended complaint [32] and then filed a cross-complaint and the Court permitted——

Mr. Fennemore (Interrupting): If the Court please, I see no reason——

The Witness (Interrupting): Well, that is the record.

Mr. Fennemore: Let me ask you one final question: Did you have any agreement with the Eloy Gin Corporation that they will compensate you for your work in their behalf?

A. I have no agreement with anybody, but I am going to be compensated.

Q. The truth is, you will be compensated by the Home Insurance Company?

A. Well, I don't know whether they will jointly pay me. They got a new attorney now, but I certainly done a lot of work for them in the past.

Mr. Fennemore: The plaintiff rests.

Mr. Jenckes: Your Honor, please, at this time the Eloy Gin Corporation moves that the Court enter judgment for the Eloy Gin, to the effect that the plaintiff take nothing by its complaint against Eloy Gin. It appears from the complaint that certain cotton of the Eloy Gin was sold to Smith and that apparently there was some [33] statement in a gin yard receipt with respect to covering it with insurance. At least, that is the allegation in the complaint. Later on in the complaint it is specifically set forth that such insurance was obtained.

Now, frankly, at the moment I am completely at a loss as to how the complaint states a cause of action against us or how the evidence establishes any cause of action against us. Apparently, if this action is predicated upon a contract to insure, not only the complaint, but the evidence discloses that we complied with that contract. Now, under those circumstances I can't see how we should be kept in the case any longer.

The Court: I don't know. What do you think about it?

Mr. Fennemore: Well, if the evidence does disclose that they be insured and that the insurance is collectible, then our cause of action is against the Home Insurance Company, but it is very questionable whether the evidence shows that they got insurance which is of any benefit to us and took advantage of it. It may be that at the close of the case I may ask for leave to amend to conform to the evidence to add the allegation [34] that if they did have insurance and did not take steps to collect, which they were obligated to do under the policy.

Mr. Jenckes: Well, there is no allegation of that now.

Mr. Fennemore: There is not now. If the evidence shows that, I ask leave of the Court to make that amendment in the alternative.

Mr. Jenckes: We object to that very strenuously. We didn't come in here to defend a cause of action which——

Mr. Fennemore (Interrupting): The evidence

shows definitely they did not include this insurance in their Proof of Loss——

The Court: Yes.

Mr. Jenckes: There is no obligation we have to take on the duty——

Mr. Fennemore (Continuing): ——to conform with the evidence shown, and without objection I ask leave to amend the complaint.

Mr. Jenckes: We object on the ground it is wholly immaterial whether we did or whether we didn't, and, second, we are taken wholly by surprise. Frankly, the complaint does not even state a cause of action that I can see. We are charged apparently with the duty to get some [35] insurance and then it says in the complaint we got the insurance. The evidence shows we got the insurance. Now, there is certainly no allegation that we had any duty to collect for them. They could collect themselves if they wanted to. What duty did we breach?

The Court: Well, is there any duty cast upon the gin company to get this cotton insured?

Mr. Jenckes: Well, I say, in the first place, if your Honor please, that there was not, because of the fact that when they bought the cotton, the contract which is in evidence provides that it was at the seller's risk until paid for, and the general rule is, under the Sales Law, that where a purchaser has bought an article from a seller, the article remains in the possession of the seller until after payment and title passes, and the risk on that cotton then falls upon the purchaser, so that in this

case it is our contention that not only under the Sales Act did the risk fall upon the purchaser, but, secondly, we had no duty to insure it and, third, if we had that duty, we complied with that duty. The policy specifically covers cotton in our hands belonging to a purchaser where we have sold it and, so, we performed all that we were required [36] to perform if we had any duty whatsoever. Now, if it is contended that we had to go further and that we had to make collection for them, there certainly is no contractual agreement anywhere pleaded, nor proof that we made such an agreement to collect for them. The law is, as I think it is, that the bailor in a case of this kind can collect on that insurance if he wants to. If they wanted to sue the Home, they could have sued the Home a long time ago, but they didn't. They bring us in because we did what we were supposed to do, so what are we doing in a lawsuit?

The Court: I don't know.

Mr. Fennemore: Well, if the Court please, if they did insure——

The Court (Interrupting): Well, they did, that is obvious because there is a policy issued.

Mr. Fennemore: The policy covered our cotton and that policy required them to make a Proof of Loss and collect it. It is payable to them and not to us. As I have already asked, may we amend the complaint in the alternative, that if they did insure, that they failed to take the necessary steps to make that insurance effective by making a Proof of Loss?

Mr. Jenckes: There isn't any allegation [37]

anywhere that we did have any such duty or that we so contracted. Secondly, I think the general rule is, reading from *Richartz versus Martin*, 31 N.W. 2d, 158, I will just read the headnote:

“Generally, where bailee has taken out insurance on bailed property, bailor may maintain an action directly against the insurer even though the bailor is not named in the policy, and though the policies are payable to or adjustable with the bailee only.”

Now, that is our case. Wisconsin says that is the general rule, so if they had a right to come in and take the benefit of the insurance that we secured for them, I don't see how you can create any implication that there was a duty on our part to go ahead. As a matter of fact, I think Smith was the real party in interest. It was his cotton. He was the one who suffered the loss, and I might go one step farther, if your Honor please, it is in the case of *Harwood-Yancey versus Lawrenceburg Warehouse Company*, 65 Southwestern 2d, 193, and it is almost identical with this case. The headnote reads:

“Holder of negotiable warehouse receipt, who also carried general insurance under policy providing for advance, in case of loss, of amount [38] of recovery from bailee, could not, for benefit of general insurer, sue warehouse men for breach of agreement to insure.”

Now, that is right smack on the nose, and just reading the subheading:

“Holder of warehouse receipt could not sue for benefit of general insurer insuring all his cotton,

under policy which excluded from coverage cotton for which any carrier or other bailee was liable, and providing that, in event of loss, insurer would advance, as loan to insured, amount of loss or damage repayable only to extent of any recovery from bailee, since inasmuch as insured recovered under such policy, he had sustained no loss from warehouse company's breach of contract to insure except cost of premium on general policy, and he had no right of action for lack of insurance, and therefore there was no right of action to which general insurer could be subrogated, save suit for amount of premium."

Now, if that is the rule under the circumstances of this case that we have no liability even if we didn't insure, because the fact that he went out and got his own insurance and paid for it, then how on earth, if we did go a step farther and actually issue insurance, how then [39] could we create any more liability than if we didn't take insurance at all? Now, we are just not the proper party in this suit. It may be he has a claim against the insurance company, but not Eloy Gin. Mr. McKesson points out that the stipulation is that it was paid for and it goes back to the contract that was made between the parties to the effect that the insurance was at the seller's risk until paid for. If that means anything, it must mean it was at the buyer's risk after it was paid for and, of course, that is the general rule under the Sales Law, the uniform Sales Act, that it is at the buyer's risk after it is paid for, so I just don't know why I am here, your Honor, and

if I have to proceed to defend, I am kind of in a bind, because I don't know what to defend against.

Mr. McKesson: I have some motions also to make.

Mr. Fennemore: As far as the cases Mr. Jenckes has, there are two particular cases and there are other squarely to the contrary.

The Court: There usually are.

Mr. Fennemore: One Supreme Court decision of the United States. I'd like to submit all the authorities to your Honor and you can pick [40] between them, and I would like to have your Honor rule on my motion for leave to amend in the light of the evidence.

The Court: Well, I will permit you to make the amendment. If Mr. Jenckes is right it wouldn't make any difference.

Mr. Fennemore: I will have to prepare that, but the amendment will be in the alternative, that if they did insure they did not take the proper steps to protect the insurance that they were obligated to under the terms of the policy.

Mr. Jenckes: If your Honor please, it makes this difference, that I am now confronted with dereliction, alleged dereliction of duty that I was not confronted with before.

The Court: Well, if you are not required to, what difference does it make?

Mr. Jenckes: I will agree with you if I was not required, but then I ought to be dismissed out of the case. I think the thing ought to go a step at a

time. I don't think we should defend a case where the cause of action is not pleaded.

The Court: All right.

Mr. McKesson: If your Honor please, at this time the Home Insurance Company moves for judgment against the plaintiff in this action [41] on the ground and for the reason that, first, that the complaint fails to state a claim against us and the evidence fails to state a claim against the Home Insurance Company, and also the record shows that there is no privity of interest between the Eugene B. Smith and Company and the Home Insurance Company, and that the uncontradicted evidence in this case is Exhibit 1-D, as part of the stipulation, which was our Policy Number 6857 that was introduced by the plaintiff, and that policy, among other things, provides that this policy insures the Eloy Gin Corporation and loss, if any, to be adjusted with the insured named herein and payable to insured. It is not payable to any other person at all, Eugene B. Smith or anybody who holds a storage receipt or anything else.

I refer your Honor to Plaintiff's 1-D, which is the plaintiff's evidence here introduced and reading from the policy, it says:

"This policy insures Eloy Gin Corporation. Loss, if any, to be adjusted with the insured named herein and payable to insured on merchandise of every description, except as hereinafter excluded, consisting principally of cotton by-products, materials and supplies manufactured [42] or in process of manufacture, or on materials for manufacturing

same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and, provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor, this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage * * *." So, the evidence is on the part of the plaintiff that this is their policy and it ran to the Eloy Gin Corporation and the Eloy Gin Corporation made no claim upon the Home Insurance Company for these 39 bales of cotton right away, but if they lost the other bales of cotton and this action was instituted, if we were insured under it, why, it would be out anyway because this is a New York Standard Form and no action was instituted within one year. Our legislature readopted the New York Standard Form in '45, and the New York Standard Form provides that no action shall be sustainable unless commenced within 12 months next after inception of the loss. It is true that the statute of limitations on an ordinary contract is six years after it becomes due, but [43] this has been adopted two or three times since, so the one year would apply on that. Then, further than that, so far as—if we could be considered in it at all, so far as this evidence is concerned, this Exhibit 1-A and 1-B which was covered by Mr. Jencke's motion, both contracts provide:

"We hereby confirm having purchased from you today, through conversation with Jack Pretzer, 300

bales of cotton." The next is for a thousand bales at grade, staple, price, delivery in lots of not less than 100 bales, as fast as ginned and cards obtained; terms, weights, insurance at seller's risk until payment completed; reimbursement, sight draft, gin yard receipts attached, also Smith—doxy cards; draw on Eugene B. Smith and Company care of Valley National Bank, Phoenix, Arizona, invoices in duplicate.

Now, it is stipulated, according to our stipulation of the facts, that these two contracts for 1,300 bales were carried out prior to this fire and all had been paid for, and that all of the cotton, all the 1,300 bales had been removed from the gin yard with the exception of these 39 bales, and they had not been taken away, so the evidence of Mr. Churchill is, and the deposition [44] which is in evidence, shows that immediately when they pay for the cotton, why, they have it insured themselves at their risk, and that is customary, and in the depositions in the record here where the man that is down in Dallas, he said he didn't know anything about these contracts or anything about it, but whenever their company bought cotton and they owned it, they always had it insured, so this is a special agreement whereby it was at the seller's risk, and the stipulation is it was all paid for, so I think the motions of the Eloy Gin Corporation should prevail at this time, as well as mine on behalf of the Home Insurance Company. There is certainly the privity of interest.

The Court: Then that will settle the case. All

you have to do is rest. Both you and the Eloy Gin submitted?

Mr. McKesson: Well, I would just like, if the Court isn't going to do that, I want to just put on just a little bit of evidence to the effect that our original Proof of Loss which was sent up by the Eloy Gin, it did not include these 39 bales of cotton.

The Court: Mr. Bolt testified to that.

Mr. Fennemore: That is already in the [45] record.

Mr. McKesson: It was not included in the Proof of Loss.

The Court: Yes.

Mr. Fennemore: And the reason for it. Could we recess until right after lunch and let you know?

The Court: Yes. You were both so certain of your position I didn't expect you to offer anything.

Mr. Fennemore: Yes, we are.

Mr. Jenckes: That is why we think the motion should be granted.

Mr. McKesson: I know, but Mr. Fennemore said he had some cases.

Mr. Jenckes: I will tell you frankly, I am willing to rest at this time upon the admission that the only cause of action attempted to be proven here, attempted to be pleaded against the Eloy Gin is apparently the contract of insurance, or the implied contract that Mr. Fennemore has mentioned in his amended complaint, that we apparently failed to carry through and collect the proceeds. If that is the case I am perfectly willing to rest at the moment. I take it that is true, is that right?

Mr. McKesson: I'd like to see his amendment.

The Court: All right, we will recess until [46] two, then.

Mr. McKesson: And the witnesses be instructed to be back at two o'clock?

The Court: All right.

(Thereupon a recess was taken at 12 o'clock noon.) [47]

(Two o'clock p.m., after recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Fennemore: If the Court please, I have prepared an amended pleading to plead the alternative as I suggested this morning in my motion. I just found out, though, that my secretary, in writing it out, has made a mistake in one paragraph which I find we had as the alternative. If it is agreeable with counsel to file the pleading, there will be no other change.

Mr. Jenckes: That is Paragraph 3 of the second cause of action?

Mr. Fennemore: Yes.

Mr. Jenckes: In other words, you want to allege that, three, there was a policy issued by the Home Insurance Company?

Mr. Fennemore: Yes.

Mr. Jenckes: That is what you intend to do?

Mr. Fennemore: Yes.

Mr. Jenckes: I don't have any objection to the procedure on the thing from the standpoint of typing it over and submitting it. I, of course, have

an objection to the Court permitting him to [48] file it at all.

Mr. Fennemore: Well, I take it the Court has already ruled I might do it.

Mr. Jenckes: That is right, but, of course, in view of the fact we now have something tangible I'd like the opportunity to state our objection.

The Court: All right.

Mr. Jenckes: We would like to object to the amendment, particularly the first cause of action——

The Court (Interrupting): Well, I had better see it, I will know what you are talking about.

Mr. Jenckes: All right. I think for the purpose of this objection it will be agreeable with counsel, you are just substituting——

Mr. Fennemore (Interrupting): Paragraph 3 of the second cause of action.

Mr. Jenckes: I see. If you will look at that first cause of action, if your Honor please, it now changes the situation in this respect to where, in the original complaint it was alleged that we had, in effect, agreed to get insurance, and we had secured insurance. Now, in this one it appears that we have not secured insurance, and that is contrary to the evidence in the case, [49] and I don't think he should be permitted to amend the complaint where the evidence does not support it.

Mr. Fennemore: If the Court please, my motion this morning was to amend to conform with the evidence and to plead in the alternative. The contention of the insurance company is that the policy did not cover by its terms for various and sundry

reasons and, in the second place, there was certain provisions in the policy which were not complied with. Whether it did or did not cover is an arguable point that I would like to submit authorities on, but when confronted with the possibility that the Home policy, by its terms, did not cover this particular cotton as contended by the insurance company, I had to plead it that way in the alternative that the assured did not take the proper steps.

Mr. Jenckes: We are having a lot of hot and cold wind blown down our necks, if your Honor please, but I would like to know if I will have to put my coat on or turn the heat on, I don't know.

The Court: I don't see where it would alter the situation at all.

Mr. Fennemore: There is no contradiction [50] in the evidence.

Mr. Jenckes: Your Honor, please, the evidence is——

The Court (Interrupting): Well, that is all right. He can plead to as many causes of action in as many different ways as he pleases.

Mr. Jenckes: Not at this stage of the game, if your Honor please.

The Court: He can with the Court's permission conform with the evidence.

Mr. Jenckes: That is right, and that is just the point I am making, that it does not conform to the evidence, and it is clear from this policy that those particular bales were covered. Now, he comes in and says, "I want to plead to conform to the evidence." It does not conform to the evidence. The

evidence is that they issued a policy and it covered this cotton, all being the property of the insured, that was the Eloy Gin, or sold, but not delivered or removed. Now, if this cotton was not covered by that language or sold or not delivered and removed, then there is no way to right it, that is, upon changing the first cause of action, that it does not conform to the evidence, because it does appear that the policy was issued and it [51] appears in the specific language of the policy that it did cover.

The Court: Mr. McKesson does not agree to that.

Mr. Fennemore: Mr. McKesson says it was excluded from the provisions of the policy.

Mr. Jenckes: As far as Mr. McKesson is concerned, Eloy is the only one they are asking for judgment on this first cause of action. Apparently they are letting Mr. McKesson off the hock on the first cause of action. It says: "Wherefore, plaintiff prays judgment against Eloy Gin Corporation," so Mr. McKesson is not covered in this first cause of action.

The Court: Well, if it was not covered Mr. McKesson would be off the hock.

Mr. Jenckes: That is right, but the contract is not ambiguous, if your Honor please; it is subject to construction. It is quite clear that the contract did cover the cotton, so that I don't see how we can, even in the exercise of discretion, permit to amend not to conform to the evidence.

Mr. Fennemore: If the Court please, it still is not entirely clear to me that it does cover it. It is

in the insuring clauses, but from [52] the other clauses in the policy it might very well exclude it, and that is purely a question of law, because the contract is before your Honor and it is a question what the law on that point is, although I think the law might be somewhat in conflict even on that point.

The Court: Probably is. Well, I will allow the amendment.

Mr. Jenckes: Well, that is our objection so far as the first cause of action is concerned. Now, so far as the second cause of action is concerned, we object on the ground it is entirely a different cause of action that we were brought in here in the first place, that it is certainly a surprise to us that we are now to meet that charge, that we failed in our duty, apparently which counsel grabs out of thin air, to recover from the insurance company the insurance proceeds and to pay it over to Smith. Now, first of all, our objection is predicated upon the grounds that it is too late to make this amendment, that the statute of limitations has barred this cause of action. There certainly was not a contractual agreement on our part to pay that money over to or to collect it, so if it is a cause of action at all, it sounds in tort, and the longest period [53] of limitation that would possibly be effected would be the four-year statute—well, the four-year general statute or the two-year statute on generally a trespass. I think, also, there is a statute, if I am not mistaken, on negligence. I know the evidence, whichever the statute is applicable, is quite clear

that the cause of action is barred by limitations. Again, it is our contention that there has been no damage to the plaintiff in this case by virtue of any act of the Eloy Gin in failing to perform any contractual obligations that it might have had, for the reason that Smith was fully insured, and under the law this is not the kind of a case where Smith's insurer would be entitled to subrogation. There is no privity between Smith's insurer and Eloy Gin, and if we owe any duty from a contractual standpoint to Smith, that does not follow through to this insurer. The insurer does not have the benefit of that.

Mr. Fennemore: If the Court please, that second cause of action is upon the contract, the cause of action I raised which obligated them to place the insurance on, and they did, and by that they were obligated to collect it. I agree with Mr. Jenckes, in theory, based on any tort [54] obligation, is barred by any statute at this time.

The Court: I can't see from what I know of this case how the plaintiff can recover. He may be able to.

Mr. Fennemore: I will submit a brief on that, if your Honor please.

The Court: It is a little too tenuous for me to grasp from what I have heard, but I will allow these amendments if you want to make them.

Mr. Fennemore: Have you both rested?

Mr. Jenckes: As far as Eloy Gin is concerned, we rest.

Mr. McKesson: The insurance company rests.

The Court: All right.

Mr. McKesson: But I would like to make a motion.

The Court: You have been making motions all day.

Mr. McKesson: I have an amended Answer here now.

The Court: All right, go ahead.

Mr. McKesson: At this time, your Honor, please, in view of the fact that the Court has permitted the filing of the second amended complaint which, instead of covering one cause of [55] action now covers two causes of actions, the Home Insurance Company—I take it from the pleadings in the first cause of action, seeks no relief from the Home Insurance, but if it be inferred or is to be added to or anything else, we make motion for judgment for the Home Insurance Company as to the first cause of action. No judgment is requested in it. As to the second cause of action, we move for judgment for the Home Insurance Company on the ground and on the basis that the same fails to—it fails to state a claim against the Home Insurance Company, and further than that, that the second cause of action sounds in tort and arising out of a contract.

(Further argument between Court and counsel.)

Mr. McKesson: And upon the further ground we seek judgment on the ground that it is barred

by the statute of limitations, either the two-year or four-year statute. It does sound in tort and, therefore, this loss occurred on January 25th, 1946, more than four years and a half, and on the further ground that the uncontradicted evidence in this case shows that was a special contract which was admitted on stipulation, that Eugene B. Smith and Company, by their separate [56] contract, agreed with the Eloy Gin Corporation, that the Eloy Gin, the seller, should be responsible for any loss by fire until paid for. That means that the Eugene B. Smith and Company assumed the loss thereafter and the uncontradicted evidence is later it was paid for and delivered in accordance with the contract. There is absolutely no liability on the part of the Eloy Gin Corporation or the Home Insurance. Further than that, there is no evidence in this case showing any waiver on the part of the insurance company towards Eloy Gin is concerned or anybody else in this case, including Eugene B. Smith or its insurance carrier, so I submit, your Honor, on all those grounds we are entitled to judgment against Eugene B. Smith and Company.

Now, as to Eloy Gin Corporation, they have a counterclaim against us in saying that if judgment is rendered against them, they want one against us, and briefly, the pleadings in that state that the cotton that was insured and they had a fire insurance policy in effect and it was payable to them and that if they are liable to Eugene B. Smith, that we, in turn, should be liable to them, and I submit that the Eloy Gin Corporation, the cross-

complainant in this action [57] against the Home Insurance Company, has introduced no evidence and showing no right to recover under this cross-claim against us, and, further, the uncontradicted evidence shows in this case that they did not comply if there was insurance as far as they were concerned, and they were legally liable for it, that no Proof of Loss was filed for this particular insurance and there is no other extenuating circumstances and no action was brought within 12 months, or any other time until last Monday against us, so we move for judgment against the Eloy Gin Corporation on their cross-complaint.

The Court: All right, the motion will be denied at this time.

Mr. Fennemore: What about the time for filing a memorandum of authorities, your Honor?

The Court: What I am interested in is the plaintiff's theory of the case.

Mr. Fennemore: I suppose I had better start off briefing, then.

The Court: Yes.

Mr. Fennemore: Could I have 20 days on it?

The Court: Yes.

Mr. Fennemore: My principal legal assistant has got himself involved in a murder case and [58] I won't get any help out of him for a week or so.

The Court: All right. How much time do you want?

Mr. McKesson: Well, we might want more than 20, because we might be tied up on something else.

The Court: Well, I suppose it will be extended

eventually to three months. Well, 20, 20 and 10 to start with.

Mr. McKesson: All right.

Mr. Fennemore: All right.

(Thereupon the trial was ended at 2:30 o'clock p.m. of the same day.) [59]

I Hereby Certify that the proceedings had and evidence given upon the trial of this cause is contained fully and accurately in the shorthand notes taken by me of said trial, and that the foregoing 59 typewritten pages contain a full, true and accurate transcript of the same.

/s/ LOUIS L. BILLAR,

Official Shorthand Reporter.

[Endorsed]: Filed August 8, 1951.

PLAINTIFF'S EXHIBIT No. 2

In the District Court of the United States
for the District of Arizona

No. 1135, Civil

EUGENE B. SMITH & CO., INC.,

vs.

ELOY GIN CORPORATION and HOME IN-
SURANCE COMPANY

DEPOSITION OF T. S. McCORKLE

October 5, 1950

T. S. McCORKLE

being first duly sworn, examined in chief by Mr.
Grissom, testified as follows:

Q. What is your name, please, sir?

A. T. S. McCorkle.

Q. Where do you live, Mr. McCorkle?

A. Dallas; Dallas, Texas.

Q. What business are you in?

A. Cotton business.

Q. Are you conected with some organization en-
gaged in buying and selling cotton?

A. Yes, sir, I am engaged with Eugene B.
Smith & Company.

Q. What is the nature of that organization?

A. Merchants, buyers and sellers of cotton.

Q. What is the character of its organization?

A. It is a corporation incorporated under the
laws of the State of Texas.

Plaintiff's Exhibit No. 2—(Continued)

Q. What is its correct corporate name?

A. Eugene B. Smith & Co., Inc.

Q. Eugene B. Smith & Co., Inc., is that correct?

A. That is correct.

Q. Is that correct?

A. Yes, sir, that is correct.

Q. Do you know some of the history of that company? A. Yes, sir. [4*]

Q. When was it incorporated?

A. The firm of Eugene B. Smith & Company, Incorporated, was formerly Eugene B. Smith Industries, Incorporated, incorporated, I believe, in March, 1946. The name was changed to Eugene B. Smith & Co., Inc., on or about July 1st of that same year.

Q. Well now, do you recall whether or not Mr. Smith operated in some other way prior to the incorporation of this company?

A. Yes, sir, it was Eugene B. Smith & Company, was a proprietorship prior to the incorporation of this business.

Q. Well, was that a corporation, I mean, was that a partnership, or was it owned individually by Mr. Smith?

A. It was owned individually by Mr. Smith, that is correct.

Q. He didn't have any partners then?

A. No, sir.

Q. Were you connected in any way with Eugene B. Smith & Company, the proprietorship?

* Page numbering appearing at top of page of original Reporter's Transcript.

Plaintiff's Exhibit No. 2—(Continued)

A. For a number of years, yes, sir, I would say eight years—seven years, while it was a proprietorship, yes, sir.

Q. Well, do you mean continuously, or, from time to time? A. Continuously, yes, sir.

Q. When did Mr. Eugene B. Smith cease doing business as a cotton merchant under the name of Eugene Smith & Company, [5] proprietorship?

A. On June 1, 1946.

Q. What became of his assets and liabilities as a proprietorship at that time?

A. It was transferred over to the corporation—it was—the corporation took over the cotton business at that time.

Q. Well, were you connected with Eugene Smith & Company, the proprietorship, at the time of the incorporation as Eugene B. Smith & Company, Inc.?

A. Yes, sir, I was.

Q. Are you an official of the corporation?

A. Yes, sir, I am vice president of the company.

Q. How long have you been vice president of the company? A. Since its incorporation.

Q. What particular part of the business do you personally handle?

A. It is hard to say, I am in charge of the Dallas office of Eugene B. Smith & Company. My duties are varied.

Q. Well, you say Eugene B. Smith & Company, is that the corporation or the proprietorship?

A. Well, it is now the corporation, yes, sir.

Q. You mean since July 1, 1946, why you spoke

Plaintiff's Exhibit No. 2—(Continued)
of Eugene B. Smith & Company as Eugene B. Smith & Company, Inc.?

A. Yes, sir, as far as my duties, you asked me, my duties didn't change, except my title. [6]

Q. You have been manager of the Dallas office all along? A. That is correct.

Q. During the time you have been connected with it? A. That is correct, yes, sir.

Q. Now, when the corporation became Eugene B. Smith & Company, Incorporated, I believe you say that Mr. Smith transferred all of his assets and liabilities as a proprietorship to the company?

A. That is, everything connected with the cotton business was transferred to the corporation.

Q. What change, if any, took place in the operation of the business upon the incorporation of the company?

A. Only the name, only it was a corporation instead of a proprietorship, the operation did not change, it continued on.

Q. What happened to the bank accounts?

A. They were changed to the corporation, taken over by the corporation just as they were.

Q. How did Eugene B. Smith & Company, the proprietorship, carry its bank accounts, for instance?

A. The proprietorship carried its bank accounts as Eugene B. Smith & Company.

Q. Well, upon the incorporation of the company as Eugene Smith & Company, Inc., what happened to the bank accounts?

Plaintiff's Exhibit No. 2—(Continued)

A. They were changed to Eugene B. Smith & Co., Inc., [7] through the necessary steps, through advice to the bank by Mr. Smith, I believe, personally notified the banks that henceforth the bank accounts would be Eugene B. Smith & Co., Inc.

Q. If Eugene B. Smith & Company, the proprietorship, had contracts with reference to cotton at the time of the incorporation, what became of them?

A. They were taken over by the corporation just as they were.

Q. Do you know whether it is—the contracts of the proprietorship were carried out and executed by the corporation?

A. All executed by the corporation.

Q. Well, if Eugene B. Smith & Company, the proprietorship, owned receipts from gins and warehouses, what became of them?

A. They were transferred to the corporation, they became owned by the corporation at the same time.

Q. Do you know whether any formal written instruments of transfer were made from Eugene Smith, as Eugene B. Smith & Company, the proprietorship, to the corporation—how was that handled?

A. The only formal record that I know of was a simple bookkeeping entry. I don't know of any other, except that the records of the company were changed, that is, the necessary bookkeeping entries were made at that time.

Plaintiff's Exhibit No. 2—(Continued)

Q. You mean it just kept the same set of books and went [8] right on?

A. Oh, yes, that is correct. Well, I don't think it is the same set of books, we might have set up a new ledger, but it was done by the same book-keeping machine, and the accounts were set up as Eugene B. Smith & Co., Inc., accounts.

Q. State whether or not all of the assets, contracts of Eugene B. Smith & Company, the proprietorship, as cotton merchants, were taken over by the corporation?

A. They were, they were taken over, yes, sir.

Q. Now, this lawsuit, according to the pleadings, involves forty bales of cotton alleged to have been held under receipt from the defendant Eloy Gin Company in the name of Eugene B. Smith & Company in January, 1946. Do you recall what happened to those receipts?

A. Not of my own knowledge. I am told that there was a fire.

Q. Well, who handled that?

A. Mr. Churchill, our manager in Phoenix, it was handled through the Phoenix, Arizona, office.

Q. Was the Phoenix, Arizona, office in January, 1946, and up until July, 1946, in charge of Mr. Churchill? A. Yes, sir, that is correct.

Q. Do you know whether or not the incorporation of the proprietorship's business also included the proprietorship's operations in [9] Arizona?

A. Yes, sir, that is correct, they do.

Plaintiff's Exhibit No. 2—(Continued)

Q. Were the assets and liabilities of Mr. Smith, Eugene B. Smith, in Arizona, also handled in the same way?

A. Any such assets or liabilities in Arizona were the same as if they were anywhere else, yes, sir.

Q. Mr. Smith operates in a number of states?

A. Yes, sir, that is correct.

Q. You mean he did as a proprietor?

A. He did as a proprietor.

Q. And the corporation does now?

A. Succeeded to the same operation, yes, sir.

Q. Has there been any break in the handling of it?

A. No, sir.

Q. Since the incorporation?

A. No, sir.

Q. Now, these receipts, alleged, from the Eloy Gin Company, involving the cotton alleged to have been burned out there, you did not personally handle them, and don't have them here?

A. No, sir, I didn't.

Q. It was handled by Mr. Churchill?

A. Yes, sir, in Phoenix.

Q. If I understand it, you do know, though, that all of his cotton business was handled in that way?

A. That is correct, yes, sir. [10]

Q. And transferred over to the corporation?

A. That is correct.

Mr. Grissom: That is all.

Plaintiff's Exhibit No. 2—(Continued)

Cross-Examination

By Mr. Johnson:

Q. Mr. McCorkle, are you familiar with this contract of January 25, 1946, at all?

A. No, sir, I am not.

Q. Do you know of this purchase of some 1300 bales of cotton under that contract of January 25, 1946?

A. I don't recall it, no, sir.

Mr. Johnson: Mr. Reporter, I hand you an instrument Mr. Grissom has given me, and ask you to initial and mark that instrument.

(Said instrument marked Defendants' Exhibit Number 1.)

Mr. Grissom: Pardon me, since these are copies of each other, let us just use one of them, if you don't mind.

Mr. Johnson: All right.

Q. (By Mr. Johnson): I hand you a copy which has been marked Defendants' Exhibit 1, Number P-201, and ask you if you are familiar with that instrument?

A. Yes, I am familiar with the—I don't recall this transaction—it is one of many transactions, if I make [11] myself clear, I don't recall this particular transaction.

Q. Do you know that in that connection you had another contract number P-200, which covered 300 bales of cotton, in addition to this 1,000 which was also bought from the Eloy Gin Company?

Plaintiff's Exhibit No. 2—(Continued)

A. No, sir, I don't recall the transaction about it.

Mr. Johnson: Mr. Reporter, mark that as Defendants' Exhibit Number 2, and mark both sides of it, please.

(Said instruments marked Defendants' Exhibit Number 2, for identification.)

Q. (By Mr. Johnson): I hand you Defendants' Exhibit Number 2, and ask you if it does not bear the same date as Defendants' Exhibit Number 1, and the same parties to the contract?

A. Yes, sir, it appears to be similar.

Q. Are you familiar with the contract at all?

A. No, sir, only what I see now.

Q. Do you know that on that day they did buy, your company did buy, 1300 bales of cotton under orders numbers P-200 and P-201 from the Eloy Gin Corporation?

A. Only judging from those contracts, I don't recall the transaction, I would have to consult other records to substantiate that. It appears we did, yes, sir.

Q. Those are your confirmations on your confirmation forms? [12]

A. That is correct.

Q. And the blanks filled in are the usual and customary blanks, aren't they?

A. That is correct.

Q. And provide the usual and customary charges, method of payment, and so forth?

A. That is correct.

Q. And they are also in accordance with the

Plaintiff's Exhibit No. 2—(Continued)

Dallas Cotton Exchange contracts, aren't they?

A. To my knowledge, there is no Dallas Cotton Exchange contract.

Q. Well, there are certain rules of the Cotton Insurance Association?

A. Well, the customs of the trade, customs of the trade, I would say, but no Dallas Cotton Exchange contract. This is the Texas Cotton Association.

Q. I hand you the back part of Defendants' Exhibit 2, and ask you if the local rules of the Texas Cotton Association are not provided there? They are, are they not? A. That is correct.

Q. And also the back of Defendants' Exhibit 1?

A. Yes, sir; yes, sir.

Q. And there is nothing on the face of that contract that is not in conformity with those Texas rules of 1941 and 1942, is there? [13]

A. As far as the Texas rules are concerned, I believe they undergo some changes annually, I don't know that there would be any substantial change, but, this is a 1941 and 1942 form. I notice these are dated in 1945. I just mention that, not as being of any importance.

Q. In any event, that was a part of your contract at that time, being on the back of your confirmation order, Defendants' Exhibit 1?

A. I presume that is the rules under which it is bought. To my knowledge, we don't buy Arizona cotton under Texas rules, but that is what we appeared to do in this case.

Plaintiff's Exhibit No. 2—(Continued)

Q. Well, I call your attention to the fact that there is nothing on the face, the front page of that exhibit, which conflicts with the rules on the back, is there?

A. I don't know of anything, no, sir.

Q. I call your attention to, insurance at seller's risk until payment completed, that is proper, isn't it?

A. Let's see, "at seller's risk until payment completed." That is what it says.

Q. And that is proper?

A. That is the custom, yes, sir.

Q. When the payment is completed, then it is no longer at seller's risk? A. That is correct.

Q. Now, I will ask you whether or not you know whether [14] your company, Eugene B. Smith & Company, at or about that date of this contract, did not insure this very 1300 bales of cotton under policy number OC-58587, issued by the National Fire Insurance Company?

A. I don't recall this transaction, no, sir. I don't recall it. We normally insure cotton on the day we pay for it.

Q. Have you that policy with you, OC-58587?

A. I don't have it, I believe Mr. Grissom has it.

Q. Does Mr. Grissom have it, you think?

Mr. Grissom: They gave me a copy this morning. A. I brought a copy down.

Plaintiff's Exhibit No. 2—(Continued)

Mr. Grissom: I don't know whether it is that one, or not. This is in the Royal.

Mr. Johnson: The National.

A. I asked them to give me a copy of the one under which this particular cotton was insured.

Mr. Grissom: This is policy number 283588.

Q. (By Mr. Johnson): Will you make a search for the policy number OC-58587, and indicate to the Reporter within the immediate future whether you have such a policy in the possession of your company, and whether it was ever issued?

[I am informed that this loss occurred OC-58587 National Fire Insurance Co. and that Mr. Geo. Wright has copy. S.N.]

A. I will.

Q. And will you, at that time, give your answer, as a part of this deposition, under your oath?

A. I surely will, yes, sir. Let me make a record of [15] that number, please? That is the National?

Q. May I see the Royal policy, Mr. Grissom?

Will you tell me what this Royal insurance policy is and its number, and what it covers?

A. It is a lengthy coverage. The policy is number 283585.

Q. And the coverage?

A. The coverage is fire and lightning, extended coverage, and wind storm, hurricane, hail, explosion, riot, civil commotion—is that what you want?

Q. Have you made any claims, or accepted any

Plaintiff's Exhibit No. 2—(Continued)

payment under this National Insurance Company policy? A. I accepted a payment, yes, sir.

Q. What was that, how much?

A. I don't recall the amount.

Q. What did it cover?

A. It covered an advance, or loan, against the value of the cotton involved in this fire.

Q. This very policy?

A. I couldn't testify to that, I don't know. That is the policy the insurance agent gave me in connection with this claim, they may have given me the wrong one.

Q. In any event, you did receive a payment for insurance covering this very cotton involved in this suit?

A. We received—I said we received an advance, or a [16] loan in connection with this loss.

Q. You mean you signed a loan receipt to the insurance company involved, did you not?

A. That is my best recollection.

Q. And you accepted the payment for this very cotton?

A. Yes, sir, I accepted the check that they gave me, or the loan that they gave me on this claim.

Q. How much was that?

A. I don't recall the amount.

Q. Will you verify that when you get back to your office? A. Yes, sir. I will be glad to.

[Net payment was in the amount of \$4,736.85
S.N.]

Plaintiff's Exhibit No. 2—(Continued)

Q. And tell the Court Reporter, under the same terms by which we take your deposition, that is, under oath?

A. I will be glad to do that, yes, sir.

Q. Now, as a matter of fact, you did, if you can recall, receive the sum of \$4,736.85?

A. That amount seems about right for that type—for that number of bales at that time, the market price.

Q. Or did you receive \$4,028.61?

A. I couldn't answer that, I don't recall the amount.

Mr. Johnson: Mr. Reporter, I will have you mark this insurance policy Defendants' Exhibit Number 3, please.

(Said insurance policy marked Defendants' Exhibit Number 3.)

Mr. Johnson: In the event this Defendants' Exhibit [17] Number 3, Royal Insurance Company, Ltd., is not the policy under which you received your payment under a loan receipt, I will ask Mr. Grissom's permission to substitute the policy which you produce. That will be all right, won't it, Pinkney?

Mr. Grissom: Oh, I think so, I think we got the wrong one.

A. I was in a considerable rush today, and that is the one they handed me, and that is the one I brought.

Plaintiff's Exhibit No. 2—(Continued)

Mr. Johnson: Yes.

Q. (By Mr. Johnson): Now, do your books and records indicate when payment for this cotton involved in this fire was made?

A. The records indicate that, yes, sir.

Q. I believe the method of payment employed in this particular sale-purchase transaction was the surrender to the Valley Bank of these cotton receipts and the payment into the Valley Bank, by your company, that is true, isn't it?

A. I am not familiar with the exact procedure of how they take possession of cotton in Phoenix.

Q. Aren't you familiar with your company's procedure in Phoenix?

A. Not in detail, no, sir.

Q. Will you state whether or not it was a fact that a month before the date of this fire, by drafts drawn by Eloy Gin Company upon the Eugene B. Smith & Company, Incorporated, through the Valley National Bank, the payment for this cotton [18] was made?

A. I can't testify to that, I am sorry.

Q. Can you, by your books and records?

A. The books will disclose how the cotton was paid for, yes, sir.

Q. Will you go to your books and records and ascertain whether or not one month prior to the fire, that is, one month prior to January 25, 1946, a draft had been drawn upon Eugene B. Smith & Company through the Valley National Bank in accordance with contracts 200 and 201?

Plaintiff's Exhibit No. 2—(Continued)

A. I will have to obtain that from the Phoenix records. Unfortunately, that is not kept in Dallas.

Q. It won't show in Dallas?

A. No, sir, that won't show in Dallas.

Q. But it will show in Phoenix?

A. It should show on the Phoenix records.

Q. Who has those books and records in Phoenix at this time?

A. The Eugene B. Smith & Company office in Phoenix. May I say this?

Q. Wait a second. Okay.

A. Only the general books are kept in Dallas to reflect Phoenix business. The detail purchase records are kept in Phoenix and the Phoenix office pays for its own cotton through Valley National Bank, and is only reimbursed by the Dallas [19] office in big lots, so that is why I can't account for each individual transaction here.

Q. Well now, will not the books and records in Phoenix be the books and records of Eugene B. Smith & Company prior to incorporation?

A. Yes, sir, that is correct.

Q. And they will be there in Phoenix just as they are here, that is, for the proprietorship as well as for the incorporated company?

A. Well, yes, sir. As a matter of fact, there was no change in Phoenix at all. It is just on the same running record, only the general books were changed when it was incorporated, and they are kept in Dallas.

Q. They are kept in Dallas, you say?

Plaintiff's Exhibit No. 2—(Continued)

A. Yes, sir, the general books.

Q. But your books and records here will disclose the payment by the Royal Insurance Company, or the National Insurance Company, will it not?

A. Yes, sir, it will.

Q. And that, you will verify for me and tell Mr. Irby?

A. I will.

Q. That is, the amount you received from the insurance company from these identical 40 bales of cotton——

A. I will.

Q. And the date of payment? [20]

A. I will.

Q. And the means of the payment?

A. Yes, sir.

Q. And will you attach a policy, or a photostat of it, to this deposition?

A. I will be glad to do that, yes, sir.

Q. In place of Defendants' Exhibit Number 3?

A. Yes, I will do that.

Q. And also a photostatic copy of the loan receipt which the company signed?

[Attorney Geo. Wright has possession I am informed. S.N.]

A. If I can obtain that from the insurance company. I would have to ask the insurance company for that.

Mr. Grissom: I feel sure that is already in Phoenix. I have an idea the attorneys out there have it.

Q. (By Mr. Johnson): In any event, if you

Plaintiff's Exhibit No. 2—(Continued)

can get it, you will get it for me? A. Oh, yes.

Q. And you will ask your insurance agent to give you a photostatic copy of that loan receipt?

A. I will do that, yes, sir.

Q. What is his name?

A. Charles Williams is the agent.

Q. Here? A. Yes, sir.

Q. Where is his office? [21]

A. In the Cotton Exchange Building.

Q. And he carries your insurance——

A. He is an insurance broker, he places insurance. Actually, the Cotton Insurance Association, they have their office here, too, in charge of Mr. Williams and Dobbs.

Q. Did he place this insurance covering this cotton which was supposed to burn up January 25, 1946? A. Did he place it? Yes, sir, he did.

Q. Yes. A. Yes, sir, he did.

Q. And he is still handling your insurance?

A. That is correct.

Q. Now, can you also tell from your books and records when the receipts for all of this cotton were delivered and paid for?

A. The records of the Dallas office will not disclose that.

Q. And that will be disclosed in the Phoenix office, too?

A. Their records should be complete on that, yes, sir.

Q. So all you can give me from your books and records here is that insurance transaction?

Plaintiff's Exhibit No. 2—(Continued)

A. Well, except that we eventually paid for all of the cotton here, but not under any receipts, it went out under a bill of lading. If I make myself clear, we don't handle the receipts in this office, they were handled in Phoenix. [22]

Q. Well, will the bill of lading show any of that information?

A. I doubt it, the bill of lading would not identify that particular cotton.

Q. Would you attach your bills of lading to any cotton bought from the Eloy Company, from November 7, 1945, to January 25, 1946, to the deposition?

A. I am afraid I couldn't do that, because I don't recall where we shipped cotton from any gin company to ourselves. The cotton normally moved to Galveston, or to the mills in the eastern part of the nation, and it would be shipped in our own name, it would not be identified with any particular gin company.

Q. Wouldn't your bills of lading indicate from whom you purchased it?

A. No, sir, it would not, it would be probably from several purchasers. It is classed out there and shipped to the mills.

Q. So, your bill of lading would not identify any of this cotton at all?

A. I doubt that it would. I don't know of any instance where a bill of lading that we would issue here would identify this cotton, or any similar purchase.

Plaintiff's Exhibit No. 2—(Continued)

Q. Where was Jack Pritzer located? Do you know him?

A. I don't know the man, I know of him, but I don't know [23] him.

Q. An employee of the Eloy Company?

A. I only know that by what I have heard, I don't know him.

Q. You never insure any of your cotton, you say, until you have paid for it?

A. That is the normal procedure. Actually, that is when we report it. I don't know the insurance companies' viewpoint on that, as to when we are insured, and when we are not insured, but, from a practical standpoint, a cotton man considers his cotton insured when he has paid for it.

Q. So, if you had paid for this particular cotton, it would have been insured as your cotton by the insurance company, either the Royal, or the National?

A. Yes, sir, as we paid for it, that is correct.

Q. And, if you had already made payment a month before, then it would have been your cotton, and insured under the fire insurance contract with either the Royal or the National?

A. When we pay for it, we automatically cover it with insurance, yes, sir. We don't know of the existence of the particular cotton, because we only see the receipts, or paper representing a bale of cotton.

Q. And those receipts would have been received in your Phoenix office and not here?

Plaintiff's Exhibit No. 2—(Continued)

A. That is correct.

Q. And if they were received a month prior to this fire, [24] they were automatically covered under either the National or the Royal's policy?

A. Under our reporting method, that is correct, yes, sir.

Q. But the reporting would have been done by your Phoenix office, by Mr. Churchill?

A. The reporting would be done by the Dallas office, based on records furnished us by the Phoenix office.

Q. Now, can you give me copies of those records as to this particular cotton, from the Dallas office?

A. I presume I can supply that record, Mr. Charles Williams can supply it, I don't handle the reports, so I don't know just what the detailed procedure is on that. It is a very lengthy report, listing the purchases and location of our cotton.

Q. Will you give me the report, if you can get it from Mr. Williams, and attach it to this deposition? The report you made to your insurance company, either the Royal or the National, as to this particular cotton involved in this particular lawsuit?

A. If that is available to me, I will be glad to do that, yes, sir.

Q. Yes? A. I will ask for it.

Q. And, if you will, a photostatic copy, or the original of Number OC-58587, National Fire Insurance Company policy? [25]

A. Yes, sir.

Plaintiff's Exhibit No. 2—(Continued)

Q. And the reports which were made to the National Fire which would indicate this cotton was covered under that particular policy?

A. If I am correct, I believe the reports are made to the Cotton Insurance Association. I am not positive any report is made to any particular company. It is made to the Association, which handles our policy. Unfortunately, I am not familiar with the exact procedure.

Q. Let us attach that report to this deposition, too?

A. Whatever it is.

[Not available. S.N.]

Q. Whatever the report is, covering this particular 1300 bales of cotton under orders P-200 and P-201, November 7, 1945, you understand that?

A. Yes, sir.

Mr. Johnson: I believe that is all, thank you.

Redirect Examination

By Mr. Grissom:

Q. Let me ask him another question.

Now, if I understand your testimony, Mr. McCorkle, the details of the purchase of this cotton and the receipt by Eugene B. Smith & Company, was all handled by Mr. C. N. Churchill, Jr., a representative of Eugene B. Smith & Company in Phoenix? [26]

A. That is correct.

Q. Yes. Now, the date of those contracts of purchase there, what are they, June?

Plaintiff's Exhibit No. 2—(Continued)

A. November, I believe.

Q. The 1300 bales?

Mr. Johnson: November 7, 1945.

Mr. Grissom: Yes.

Q. (By Mr. Grissom): Now, would Eugene Smith & Company have received the receipts from the Eloy Gin Company in question before or after that instrument there is dated November 7th?

A. Afterward, that would be the normal procedure.

Q. Now, those receipts carry with them certain provisions?

A. I have never seen one of the receipts. A receipt usually carries it.

Q. They do, as a rule? A. Yes, sir.

Q. What these particular ones do, you don't know? A. I don't know, no, sir.

Q. As far as you know, they would be available in Phoenix? A. Yes, sir, that is correct.

Q. Now, about this provision with reference to——

A. Pardon me, the receipts might not be available in our office, if they have been canceled, they would be available to [27] the person issuing the receipts, just like a bank check, they go back to the person issuing.

Q. At any rate, you don't have them here, as I understand? A. No, sir.

Q. With reference to the provision of the insurance at seller's risk until payment completed, you don't know what provision there was on the

Plaintiff's Exhibit No. 2—(Continued)
receipts from the Eloy Gin Company?

A. No, sir, I don't know that.

Q. Nor the custom of Phoenix?

A. Well, the custom—no, sir, I don't know that, either.

Recross-Examination

By Mr. Johnson:

Q. What is the custom in Dallas?

A. I was just about to say, that that simply means that insurance covered by seller until paid for. We usually say here in Dallas, covered by seller until paid for, which means we pick up the insurance where he leaves off. When he gets his money, we insure it.

Q. Well, when he gets his money, he is paid then?

A. Yes, sir, when he gets his money, he is paid for the cotton.

Q. If he is paid by draft drawn on you, so far as you know, he has got his money?

A. That is correct. We have paid for it, [28] anyway.

Redirect Examination

By Mr. Grissom:

Q. You don't know what changes may have been wrought in the provisions of the receipt issued by the Eloy Gin Company?

A. No, sir, I am not familiar with that.

Plaintiff's Exhibit No. 2—(Continued)

Recross-Examination

By Mr. Johnson:

Q. But, this particular contract, on its face, provides for following the rules of the Texas Cotton Association, which are printed on the back and referred to as being on the back, that is right, isn't it?

A. That is what it appears. As I said, I never had considered that that cotton was bought under the rules of the Texas Cotton Association, it is merely a form, it is a contract between two dealers in cotton, and the rules applying, we very seldom consider those rules, except in cases——

Mr. Johnson: Wait a minute. Have you completed your answer?

A. Well, I don't know, I merely said that the face of the contract is the only thing that means anything to a merchant. The rules are there, but they have no part in that contract, they are simply put there for convenience. The contract is what is written on the face of it. Sometimes it is a little scrap of paper. It means the same thing. The terms of purchase; [29] sometimes there is no contract at all, but there is a purchase, nevertheless, a written contract.

Redirect Examination

By Mr. Grissom:

Q. You mean the cotton merchants——

Plaintiff's Exhibit No. 2—(Continued)

A. We buy many thousands of bales where there is no written contract ever executed.

Q. You may pick up one that the rules existed back years before?

A. That is right, that is a convenient form to confirm the contract to purchase.

Q. But it is the confirmation itself shown on the top side of the paper that you are interested in?

A. That is right, yes, sir. It never occurred to me whether it was a '41 or '50.

Recross-Examination

By Mr. Johnson:

Q. Nevertheless, this contract says on its face that you are going to follow the Texas rules as printed on the back, doesn't it?

A. That is what it says.

Q. It also says down at the bottom that this is the only understanding between the parties, and this is the understanding? [30]

A. That is what it says, yes, sir.

Redirect Examination

By Mr. Grissom:

Q. But you say, as between cotton merchants, that is the custom you use, the form available?

A. That is correct.

Q. And you do not consider yourself bound by the rules?

A. That is right, the rules in this case, I don't

Plaintiff's Exhibit No. 2—(Continued)

know as they would apply, or not apply. The Texas Cotton Association rules are supposed to apply against Texas cotton contracts. This is undoubtedly not a Texas cotton contract.

Q. It shows on its face there that it was issued in the State of Arizona? A. That is correct.

Q. And you see Mr. C. N. Churchill, Jr., signed as agent for Eugene B. Smith & Company, is he the Eugene B. Smith & Company representative in the State of Arizona? A. That is correct.

Q. That was Arizona cotton?

A. That is right, yes, sir.

Recross-Examination

By Mr. Johnson:

Q. But, you did have, at that time, a contract of [31] insurance through the Texas Cotton Association whereby all of the cotton that you had paid for and belonged to you was insured with the underwriter, which is the National Fire Insurance Company?

A. If you ask me if we had a contract with the Texas Cotton Association to insure, no, we didn't.

Q. No, I mean all of the cotton you had bought and paid for at any given date was insured through, that is, by means of the Cotton Insurance Association? A. Yes, sir.

Q. In a particular company, which, in this case, was probably the National Fire Insurance Company?

Plaintiff's Exhibit No. 2—(Continued)

A. Will you ask that question again, please?

Q. Well, at this time, you did have a policy of insurance that you got through the Texas Cotton Insurance Association?

A. Through the Cotton Insurance Association.

Q. That is the way you got it?

A. Yes, sir, through the Cotton Insurance Association.

Q. But the actual insurance was by a certain company, a certain fire insurance company?

A. That is right.

Q. And it was probably the National Fire Insurance Company, in this case, if it was not the Royal?

A. That is correct.

Q. You are not certain which company it was at this time, [32] but it was one of the two?

A. It appears to have been one of the two, yes, sir.

Q. And whichever one was the insurer of all of your cotton that you had paid for, and therefore owned, is the policy that you are going to attach to the deposition?

A. That is correct.

Q. Either the policy itself, or a photostatic copy, which will include all of the limits of liability and the riders, and everything else?

A. That is right.

Q. You will produce either the original——

A. I will attempt to get that, I will have to get that from the insurance people themselves.

[Understand Attorney Geo. Wright has possession. S.N.]

Plaintiff's Exhibit No. 2—(Continued)

Q. A photostatic copy indicating those things?

A. Yes, sir.

Mr. Johnson: That is all.

(Signature waived.)

Admitted October 27, 1950.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Eugene B. Smith & Co., Inc., Plaintiff, vs. Eloy Gin Corporation and Home Insurance Company, Defendants, numbered Civ-1135 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my

office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries, constitute the record on appeal in said case, in accordance with the Designations filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Complaint, filed January 12, 1948.
2. Defendant's Answer, filed March 9, 1948.
3. Plaintiff's Amended Complaint, filed September 27, 1950.
4. Motion to Dismiss and Separate Answer of The Home Insurance Co., filed September 28, 1950.
5. Separate Answer of Defendant Eloy Gin Corporation, filed September 28, 1950.
6. Minute entry of October 23, 1950.
7. Motion to Dismiss, Amended Answer and Cross-Claim of Eloy Gin Corporation, filed October 25, 1950.
8. Plaintiff's Second Amended Complaint, filed October 27, 1950.
9. Minute entry of October 27, 1950.
10. Plaintiff's Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 1-F and 1-G, admitted and filed October 27, 1950.
11. Plaintiff's Exhibit 2, Deposition of T. S. McCorkle, admitted and filed October 27, 1950.
12. Motion to Dismiss and Plea in Bar, and Answer of Defendant Home Insurance Company to Plaintiff's Second Cause of Action in its Second Amended Complaint, filed November 3, 1950.

13. Minute entry of March 30, 1951.
14. Findings of Fact and Conclusions of Law, filed April 18, 1951.
15. Judgment, filed and docketed April 18, 1951.
16. Plaintiff's Motion for New Trial, filed April 27, 1951.
17. Minute entry of June 11, 1951.
18. Plaintiff's Notice of Appeal, Filed July 9, 1951.
19. Plaintiff's Bond for Costs on Appeal, filed July 9, 1951.
20. Order Extending Plaintiff's Time to File Record on Appeal and Docket the Appeal, filed July 20, 1951.
21. Reporter's Transcript, filed August 8, 1951.
22. Plaintiff's Designation of Contents of Record on Appeal, filed August 8, 1951.
23. Statement of Points on which Plaintiff Intends to Rely upon its Appeal, filed August 8, 1951.
24. Additional Designation of Contents of Record on Appeal Requested by Defendant, Home Insurance Company, filed August 10, 1951.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$4.00 and that said sum has been paid by counsel for the appellant.

Witness my hand and the seal of said Court this 11th day of September, 1951.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 13096. United States Court of Appeals for the Ninth Circuit. Eugene S. Smith & Co., Inc., a Corporation, Appellant, vs. Eloy Gin Corporation, a Corporation, and Home Insurance Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed September 13, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13096

EUGENE B. SMITH & CO., INC.,

Appellant,

vs.

ELOY GIN CORPORATION and HOME INSURANCE COMPANY,

Appellees.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD TO BE
PRINTED

STATEMENT OF POINTS

Appellant intends to rely upon its appeal herein upon the points set forth in its "Statement of Points Upon Which Plaintiff Intends to Rely Upon Its Appeal" filed by it in the United States District Court for the District of Arizona (to which reference is hereby made) and included in the record transmitted by the Clerk of the United States District Court for the District of Arizona to the Clerk of the United States Court of Appeals for the Ninth Circuit.

Designation of Record to Be Printed

Appellant designates for printing herein the following portions of the record:

1. All pleadings except plaintiff's complaint filed

January 12, 1948; defendants' Eloy Gin Corporation and Home Insurance Company joint answer thereto filed March 9, 1948, and plaintiff's amended complaint filed September 27, 1950, omitting memoranda of authorities and notices of hearing.

2. Reporter's Transcript of evidence.

3. Plaintiff's Exhibit No. 2, deposition of T. S. McCorkle, omitting therefrom the cover page and pages 1, 2, 3 and 34 of the deposition.

4. Plaintiff's Exhibit 1, Stipulation of Facts dated October 24, 1950.

5. Plaintiff's Exhibit 1-A, contract No. P-200 dated November 7, 1945, for the purchase by Eugene B. Smith & Co. from Eloy Gin Corporation of three hundred bales of cotton.

6. One (1) gin yard receipt contained in plaintiff's Exhibit 1-C followed by a note in the following words:

“All of the 38 other gin yard receipts in this exhibit are the same as the foregoing, except for the number, the gross weight shown, the day of month and the name of the person following the direction ‘To Eloy Gin Corp.’ ”

7. Plaintiff's Exhibit 1-D Home Insurance Company fire insurance policy No. 6857.

8. Plaintiff's Exhibit 1-E National Fire Insurance Company marine fire insurance policy No. OC-58587.

9. Plaintiff's Exhibit 1-F loan draft issued by National Fire Insurance Company.

10. Plaintiff's Exhibit 1-G loan agreement executed by Eugene B. Smith & Co.

11. Findings of Fact and Conclusions of Law filed April 18, 1951.

12. Judgment filed and docketed July 18, 1951.

13. Plaintiff's Motion for New Trial filed April 27, 1951, and the Order denying the motion.

14. Minute entries of October 27, 1950, except entry showing filing of subpoena.

15. Plaintiff's Notice of Appeal filed July 9, 1951.

16. Plaintiff's Bond on Appeal filed July 9, 1951.

17. Order extending time to file record on appeal filed July 20, 1951.

18. Statement of points upon which plaintiff intends to rely upon its appeal filed August 8, 1951.

19. Plaintiff's designation of contents of record on appeal filed August 8, 1951.

20. This statement of points and designation.

21. Stipulation attached hereto.

FENNEMORE, CRAIG,
ALLEN & BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Appellant.

On the 15th day of September, 1951, I mailed a true and correct copy of the foregoing document to counsel for appellees, viz. one copy thereof to Messrs. Theodore G. McKesson and Robert H. Renaud, 403 Luhrs Tower, Phoenix, Arizona, and one copy to Messrs. Evans, Hull, Kitchel and Jenckes, 807 Title and Trust Building, Phoenix, Arizona.

/s/ RICHARD FENNEMORE.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated between appellant and appellees that in printing the record in the above-entitled matter there may be included one (1) gin yard receipt of the thirty-nine (39) in plaintiff's Exhibit 1-C followed by a note in the following words:

“All of the 38 other gin yard receipts in this exhibit are the same as the foregoing, except for the number, the gross weight shown, the day of month and the name of the person following the direction ‘To Eloy Gin Corp.’ ”

This stipulation is without prejudice to the right of appellees to designate additional portions of the record for printing as provided by the Federal Rules of Civil Procedure.

Dated September 14, 1951.

FENNEMORE, CRAIG,
ALLEN & BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Appellant,
Eugene B. Smith & Co., Inc.

THEODORE G. McKESSON,
ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for Appellee,
Home Insurance Company.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. JENCKES, JR.,
Attorneys for Appellee,
Eloy Gin Corp.

[Endorsed]: Filed September 17, 1951.

